SUPREME COURT, U.S.
FILED
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OFFICE OF THE CLERK

No. 91-7580

In The

Supreme Court of the United States

October Term, 1992

GARY GRAHAM,

Petitioner,

v.

JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX
VOLUME I, PAGES 1-313

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DATE	NR.	PROCEEDINGS
2-23-88	1	PETITION FOR WRIT OF HABEAS CORPUS.
2-23-88		APPLICATION To PROCEED In FORMA PAUPERIS.
2-24-88	2	(DH) MEMORANDUM ON THE DENIAL OF A STAY OF EXECUTION AND WRIT OF HABEAS CORPUS, filed.
2-24-88	3	Pltf. NOTICE OF APPEAL to Order entered Feb 24, 1988, filed.
2-24-88	4	Pltf. APPLICATION for Certificate of Probable Cause to Authorize Appeal, For Leave to Appeal in Forma Pauperis and for Certification that Appeal is taken in good faith, filed.
2-24-88	5	(DH) ORDER DENYING STAY OF EXECUTION, WRIT OF HABEAS CORPUS, AND CERTIFICATE OF PROBABLE CAUSE FOR AN APPEAL, filed. 1. Pltf. Motion for stay of execution is DENIED. 2. Pltf. Application for a writ of habeaus [sic] corpus is DENIED. 3. Pltf. Motion for a certificate of probable cause is DENIED.
2-24-88	6	Copy of ORDER by Court of Appeals on 2-24-88 by rapicom GRANTING Stay of Execution until further notice, filed.

3-10-88	8	**RETURN OF STAY OF EXECUTION** issued to J. A. Lynaugh.
9-6-88	9	Certified Copy of ORDER by Court of Appeals DENYING Petition for Certificate of Probable Cause, filed.
10-6-88	10	Copy of ORDER by Court of Appeals on Oct 3, 1988, STAYING Execution until 6:00 p.m. October 31, 1988 to allow appellant to file a petition with U.S. Supreme Court, filed.
2-11-92	11	Certified copy of ORDER by the CCA GRANTING the motion of appellant to stay the issuance of mandate pending petition for writ of certiorari to and include 3-9-92, filed.

CAUSE NUMBER 335,378

THE STATE OF TEXAS	IN THE DISTRICT COURT OF
VS.	HARRIS COUNTY, TEXAS
GARY GRAHAM	182ND JUDICIAL DISTRICT
	AUGUST TERM, A.D., 1981
	Oct. 28, 1981

MEMBERS OF THE JURY:

The defendant, GARY GRAHAM, stands charged by indictment with the offense of capital murder, alleged to have been committed on or about the 13th day of May, 1981 in Harris County, Texas. To this charge the defendant has pleaded, "Not Guilty."

Our law provides that a person commits murder when he intentionally or knowingly causes the death of an individual.

A person commits capital murder when such person intentionally commits the murder in the course of committing or attempting to commit the offense of robbery.

A person commits a robbery if, in the course of committing theft, as defined hereinafter, and with intent to obtain or maintain control of the property, he

(a) intentionally, knowingly or recklessly causes bodily injury to another; or

(b) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

"In the course of committing theft" means conduct that occurs in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of theft.

"Attempt" to commit an offense occurs if, with specific intent to commit an offense, a person does an act amounting to more than mere preparation that tends, but fails, to effect the commission of the offense intended.

"Bodily injury" means physical pain, illness, or any impairment of physical condition, including death.

"Theft" as used herein is the unlawful appropriation of the corporeal personal property of another, with the intent to deprive such other person of said property.

"Appropriation" and "appropriate", as those terms are used herein, means to acquire or otherwise exercise control over property other than real property. Appropriation of property is unlawful if it is without the owner's effective consent.

"Property" as used herein means tangible or intangible personal property or documents, including money, that represents or embodies anything of value.

"Deprive" as used herein means to withhold property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner.

"Effective consent" means assent in fact, whether express or apparent, and includes consent by a person legally authorized to act for the owner. Consent is not effective if induced by deception or coercion.

"Owner" means a person who has title to the property, possession of the property, or a greater right to possession of the property than the person charged. "Possession" means actual care, custody, control or management of the property.

A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

A person acts knowingly or with knowledge with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly or with knowledge with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

Before you would be warranted in convicting the defendant of capital murder, you must find from the evidence beyond a reasonable doubt not only that on the occasion in question the defendant was engaged in the commission or attempted commission of the felony offense of robbery of BOBBY GRANT LAMBERT, as defined in this charge, but also that during the commission of the robbery or attempted commission thereof, if any, the defendant shot BOBBY GRANT LAMBERT with the intention of thereby killing him. Unless you find from the evidence beyond a reasonable doubt that the defendant, on said occasion, specifically intended to kill the said BOBBY GRANT LAMBERT when he shot him, if he did shoot him, you cannot convict him of the offense of capital murder.

Now if you find from the evidence beyond a reasonable doubt that on or about the 13th day of May, 1981, in Harris County, Texas, the defendant, GARY GRAHAM, did intentionally kill BOBBY GRANT LAMBERT by shooting him with a gun and that said defendant was then and there in the course of committing or attempting to commit the offense of robbery of BOBBY GRANT LAMBERT of his property, then you will find the defendant guilty of capital murder.

Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of capital murder.

A defendant in a criminal case is not bound by law to testify in his own behalf therein, but the failure of any defendant to so testify shall not be taken as a circumstance against him nor shall the same be alluded to nor commented upon by the jury, and you must not refer to, mention, comment upon or discuss the failure of the defendant to testify in this case, and any juror doing so may be guilty of contempt of court. If any juror starts to mention the defendant's failure to testify in this case, then it is the duty of the other jurors to stop him at once.

A grand jury indictment is the means whereby a defendant is brought to trial in a felony case. It is not evidence of guilt, nor can it be considered by you in passing upon the question of guilt of the defendant. The burden of proof in all criminal cases rests upon the State throughout the trial and never shifts to the defendant.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt.

The fact that he has been arrested, confined, or indicted for, or otherwise charged with the offense gives rise to no inference of guilt at his trial.

The defendant is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt, and in case you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you and these instructions, you will acquit him. You are the exclusive judges of the facts proved, of the credibility of the witnesses and the weight to be given to their testimony, but the law you shall receive in these written instructions, and you must be governed thereby.

After you retire to the jury room, you should select one of your members as your Foreman or Forelady. It is his or her duty to preside at your deliberations, vote with you, and when you have unanimously agreed upon a verdict, to certify to your verdict by using the appropriate form attached hereto and sign the same as Foreman or Forelady.

No one has any authority to communicate with you except the officer who has you in charge. During your deliberations in this case you must not consider, discuss nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

You [sic] sole duty at this time is to determine the guilt or innocence of the defendant under the indictment in this case; and restrict your deliberations solely to the

issue of whether the defendant is guilty or not guilty of the offense charged in the indictment.

After you have retired you may communicate with this Court in writing through the officer who has you in charge. Do not attempt to talk to the officer, the attorneys, or the Court concerning any question you may have. After you have reached a unanimous verdict, the Foreman or Forelady will certify thereto by using the appropriate form attached to this charge and signing his or her name as Foreman or Forelady. After argument of counsel you may retire to consider your verdict.

/s/ J. Richard Trevathan
J. RICHARD TREVATHAN,
Judge Presiding
182nd District Court of
Harris County, Texas

We, the Jury, find the defendant, GARY GRAHAM, "Not Guilty."

_____
FOREMAN OR FORELADY
OF THE JURY

We, the Jury, find the defendant, GARY GRAHAM, "Guilty" of the offense of capital murder, as charged in the indictment.

/s/ Ben D. Bradley
FOREMAN OR FORELADY
OF THE JURY

CAUSE NUMBER 335378

THE STATE OF TEXAS	IN THE DISTRICT COURT OF
VS.	HARRIS COUNTY, TEXAS
GARY GRAHAM	182ND JUDICIAL DISTRICT

MEMBERS OF THE JURY:

By your verdict returned in this case you have found the defendant guilty of the offense of capital murder, which was alleged to have been committed on or about the 13th day of May, 1981 in Harris County, Texas. It is necessary, now, for you to determine, from all the evidence in the case, the answers to certain questions, called "Special Issues", in this charge. The Court instructs you further, however, as follows:

1.

The mandatory punishment for capital murder is death or confinement in the penitentiary for life.

2.

The burden of proof in this phase of the trial still rests upon the State and never shifts to the defendant. Each Special Issue submitted must be proved by the State beyond a reasonable doubt; therefore, before any issue may be answered "Yes", all jurors must be convinced by the evidence beyond a reasonable doubt that the answer to such issue should be "Yes". If the jury unanimously determines (and only if such determination is unanimous) that the State has proved an issue beyond a reasonable doubt, then the Foreman will so record the Jury's

answer to such issue by signing his name to the finding reflecting such answer on the form provided for that purpose.

You are further instructed that if any juror, after considering the evidence and these instructions, has a reasonable doubt as to whether the answer to a Special Issue should be answered "Yes", then such juror should vote "No" to that Special Issue in the jury's deliberation.

If ten (10) jurors or more vote "No" as to any Special Issue, then the answer of the Jury shall be "No" to that issue, and the Foreman will so record the Jury's answer by signing his name to the finding reflecting such answer on the form provided for that purpose.

If there is any Special Issue on which the vote of the jurors is not unanimously "Yes" or not at least ten (10) in favor of an answer of "No", then there shall be no answer for that Special Issue and the Foreman should not sign his name to any answer form for that Special Issue.

3.

You are further instructed that in determining each of these Special Issues you may take into consideration all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to you in the first part of this case wherein you were called upon to determine the guilt or innocence of the defendant, and all the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the Answers to Special Issues hereby submitted to you.

A defendant in a criminal case is not bound by law to testify in his own behalf therein, but the failure of any defendant to so testify shall not be taken as a circumstance against him nor shall the same be alluded to nor commented upon by the jury, and you must not refer to, mention, comment upon or discuss the failure of the defendant to testify in this case, and any juror doing so may be guilty of contempt of court. If any juror starts to mention the defendant's failure to testify in this case, then it is the duty of the other jurors to stop him at once.

Under the instructions herein given, it will not be proper for you, in determining the penalty to be assessed, to fix the same by lot, chance, or any system of averages, or any other method than by a full, fair and free exercise of the opinion of the individual jurors under the evidence submitted to you.

You are not to discuss among yourselves how long the defendant would be required to serve the sentence that you impose. Such matters come within the exclusive jurisdiction of the Board of Pardons and Paroles and the Governor and are not to be considered by you.

You are the exclusive judges of the facts proved and the credibility of the witnesses and the weight to be given their testimony, but you are bound to receive the law from the Court which has been given you and you are bound thereby.

/s/ J. Richard Trevathan
J. RICHARD TREVATHAN,
JUDGE PRESIDING
182ND DISTRICT COURT
HARRIS COUNTY, TEXAS

REQUEST OF THE JURORS

FILED: –

CAUSE NUMBER 335,378

THE STATE OF TEXAS	IN THE DISTRICT COURT OF
VS.	HARRIS COUNTY, TEXAS
GARY GRAHAM	182ND JUDICIAL DISTRICT

SPECIAL ISSUE NO. 1

Do you find from the evidence beyond a reasonable doubt that the conduct of the Defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

In your verdict you will answer "YES" or "NO" as you find the fact to be.

ANSWER: Yes

/s/ Ben D. Bradley
FOREMAN OF THE JURY

REQUEST OF THE JURORS

FILED: –

CAUSE NUMBER 335,378

THE STATE OF TEXAS	IN THE DISTRICT COURT OF
VS.	HARRIS COUNTY, TEXAS
GARY GRAHAM	182ND JUDICIAL DISTRICT

SPECIAL ISSUE NO. 2

Do you find from the evidence beyond a reasonable doubt that there is a probability the Defendant would commit criminal acts of violence that would constitute a continuing threat to society?

In your verdict you will answer "YES" or "NO" as you find the fact to be.

ANSWER: Yes

/s/ Ben D. Bradley
FOREMAN OF THE JURY

REQUEST OF THE JURORS

FILED: OCTOBER 30, 1981

CAUSE NUMBER 335,378

THE STATE OF TEXAS IN THE DISTRICT COURT OF

VS. HARRIS COUNTY, TEXAS

GARY GRAHAM 182ND JUDICIAL DISTRICT

SPECIAL ISSUE NO. 3

Do you find from the evidence beyond a reasonable doubt whether the conduct of the Defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

In your verdict you will answer "YES" or "NO" as you find the fact to be.

ANSWER: Yes

/s/ Ben D. Bradley
FOREMAN OF THE JURY

0907/10

MINUTES OF THE 182nd DISTRICT COURT OF HARRIS COUNTY, TEXAS

AT THE August TERM, A. D. 1981

JUDGMENT

NO. 335378

THE STATE OF TEXAS

v.

Date October 26 1981

Kenneth Stokes aka Gary Graham on motion of the Defendant the Court ordered same charged to Gary Graham

Attorney for State: Asst. Dist. Atty. Carl Hobbs

Attorney for Defendant: Ron Mock and Chester Thornton

Offense CAPITAL MURDER Murder Murder and Aggravated Robbery as charged in four paragraphs of the indictment but upon motion of the State the 2nd 3rd and 4th paragraphs were abandoned and dismissed; the Defendant on trial for CAPITAL MURDER

Date of Offense: May 13 A.D. 1981

Plea: Not Guilty

Count and/or
Paragraph: count one paragraph on CAPITAL MURDER

Pled to Enhancement
Findings on Enhancement: n/a

Punishment: Death

The Defendant having been indicted in the above entitled and numbered cause for the felony offense indicated above and this cause being this day called for trial, the State appeared by her District Attorney as named above and the Defendant named above appeared in person with Counsel as named above, and both parties announced ready for trial.

A jury composed of Ben D. Bradley and eleven others was selected, impanelled, and sworn. The indictment was read to the Jury and the Defendant, entered a plea of not guilty thereto, after having heard the evidence submitted; and having been charged by the Court as to their duty to determine the guilt or innocence of the Defendant and the argument of counsel, the Jury retired in charge of the proper officer and returned into open court on the 28th day of October , 1981 , the following verdict, which was received by the Court and is here entered or reco:d upon the minutes:

"We the Jury, find the defendant, GARY GRAHAM "Guilty" of the offense of capital murder, as charged in the indictment

/s/ Ben D. Bradley
FOREMAN OR FORELADY
OF THE JURY"

Thereupon, the jury, in accordance with law, heard further evidence, and having been again charged by the Court, the jury retired in charge of the proper officer and returned into open Court on the 30th day of October 1981 , the following verdict, which was received by the Court and is here entered of record upon the minutes:

CAUSE NO. 335378

THE STATE OF TEXAS VS. GARY GRAHAM	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 182nd JUDICIAL DISTRICT

SPECIAL ISSUE NO. 1

Do you fidn [sic] from the evidence beyond a reasonable doubt that the conduct of the Defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

In your verdict you will answer "Yes" or "No" as you find the fact to be

ANSWER: Yes
/s/ Ben D. Bradley
FOREMAN OF THE JURY

CAUSE NO. 335378

THE STATE OF TEXAS VS. GARY GRAHAM	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 182nd JUDICIAL DISTRICT

SPECIAL ISSUE NO. 2

Do you find from the evidence beyond a reasonable doubt that there is probability the Defendant would commit criminal acts of violence that would constitute a continuing threat to society?

In your verdict you will answer "Yes" or "No" as you find the fact to be

ANSWER: Yes
/s/ Ben D. Bradley
FOREMAN OF THE JURY

CAUSE NO. 335378

THE STATE OF TEXAS	IN THE DISTRICT
VS.	COURT OF HARRIS
GARY GRAHAM	COUNTY, TEXAS
	182nd JUDICIAL
	DISTRICT

SPECIAL ISSUE NO. 2

Do you find from the evidence beyond a reasonable doubt whether the conduct of the Defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

In your verdict you will answer "Yes" or "No" as you find the fact to be

ANSWER: Yes
/s/ Ben D. Bradley
FOREMAN OF THE JURY"

It is therefore considered, ordered, and adjudged by the Court that the Defendant is guilty of the offense indicated above, a felony, as found by the verdict of the jury, and that the said Defendant commited the said offense on the date indicated above, and that he be punished, as has been determined by the Jury, by death, and that Defendant be remanded to Jail to await further orders of this court.

And thereupon, the said Defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof.

Whereupon the Court proceeded, in presence of said Defendant to pronounce sentence against him as follows, to wit, "It is the order of the Court that the Defendant named above, who has been adjudged to be guilty of the offense indicated above and whose punishment has been assessed by the verdict of the jury and the judgment of the Court at Death, shall be delivered by the Sheriff of Harris County, Texas immediately to the Director of Corrections of the State of Texas, or any other person legally authorized to received such convicts, and said Defendant shall be confined in said Department of Corrections in accordance with the provisions of the law governing the Texas Department of Corrections until a date of execution of the said Defendant is imposed by this Court after receipt in this Court of mandate of affirmance by the Court of Criminal Appeals of the State of Texas.

The said Defendant is remanded to jail until said Sheriff can obey the directions of this sentence. From which sentence on appeal is taken as a matter of law to the Court of Criminal Appeals of the State of Texas, Austin, Texas.

Signed and entered on this the 30 day of October 1981 .

/s/ J. Richard Trevathan
Judge 182nd District Court
Harris County, Texas

COPY TO TDC 11-2-81

NO. 335378-A

EX PARTE	§	IN THE 182ND
	§	DISTRICT COURT
GARY GRAHAM,	§	
Applicant	§	OF
	§	HARRIS COUNTY, TEXAS

RESPONDENT'S PROPOSED FINDINGS OF FACT AND ORDER

Having considered the application for writ of habeas corpus and the Respondent's Answer in the above-numbered cause, the court makes the following findings of fact and conclusions of law base [sic] upon the documents filed in the above numbered cause and the official court records.

FINDINGS OF FACT

1. The Applicant, Gary Graham, was charged by indictment under cause number 335378 for the felony offense of capital murder.

2. Gary Graham was convicted in cause number 335378 for the offense of capital murder; after the jury affirmatively answered the special issues, the court assessed punishment at death by lethal injection.

3. Ronald G. Mock and Chester Thornton were appointed to represent Gary Graham in cause number 335378 on June 12, 1981.

4. Prior to trial, counsel reviewed the information in the State's file several times.

5. On numerous occasions prior to trial, counsel met with the applicant and attempted to discuss the facts of the case with him. The applicant stated only that

he did not commit the robbery-murder and that he had spent the evening with a girlfriend whose name, appearance, and address the applicant could not remember.

6. Although defense counsel made numerous inquiries of applicant, he did not give his defense counsel the names of any potential alibi witnesses, nor did the applicant tell his counsel where he had been and what he had been doing on the night of the instant offense, May 13, 1981.

7. No person ever presented himself to defense counsel as an alibi witness, either before, during or after trial.

8. Specifically, the applicant did not furnish his counsel with the names or addresses of Dorothy Shield, William Chambers, Mary Brown, or Lorain Johnson as potential alibi witnesses.

9. This court finds that the testimony of William Chambers, Mary Brown and Dinah Miller concerning Gary Graham's whereabouts on May 13, 1981 is not credible testimony.

10. Gary Graham was aware that an investigator was working with defense counsel in connection with the defense of his case.

11. Counsel for applicant hired an investigator, Merv West, who assisted them in investigating and interviewing possible defense witnesses.

12. Counsel for Applicant filed a motion for a sanity and competency evaluation which was granted by the judge.

13. On August 6, 1981, Dr. John Nottingham of the Harris County Psychiatric Hospital conducted a psychiatric examination of the applicant. He determined

that the applicant displayed no evidence of any mental disease or defect which would interfere with his ability to assist his attorney. On August 26, 1981, Dr. Jerome Brown conducted a competency evaluation of the applicant. He concluded that the applicant was competent to stand trial.

14. The applicant's trial counsel did not request a third psychiatric evaluation because: 1) the two doctors' evaluations were consistent with each other; 2) the two doctors' evaluations were consistent with counsel' [sic] perception of the applicant's mental ability and judge would not authorize more than the statutory maximum of $500 for expert fees in an appointed case; 4) the defense counsel did not believe that a third, fourth or fifth evaluation would produce any different results; and 5) the defense counsel did not wish to use psychiatric mitigation evidence at the punishment phase for fear that it would "open the door" for the prosecutor to call Drs. Brown and Nottingham to testify to their findings which were thought to be detrimental to the applicant.

15. After due consideration, trial counsel determined that a mistaken identification defense would be the applicant's best defensive strategy.

16. Trial counsel and their investigator interviewed at least ten potential mitigation witnesses. Only two, the applicant's stepfather and his grandmother, would agree to testify favorably for the applicant. They did so at trial.

17. Counsel did not introduce testimony concerning applicant's drug and alcohol abuse as counsel reasonably believed (1) that such evidence would not be perceived by the jury as mitigating evidence, and (2) that such evidence would provoke little, if any, sympathy for applicant.

18. Trial counsel, Ronald G. Mock, attended the same high school as the State's main eyewitness, Bernadine Skillern. He was not personally acquainted with her.

19. Ronald Mock requested and received a pretrial suppression of identification hearing. Both at this hearing and during trial, he attempted to impeach Mrs. Skillern's ability to perceive, recollect, and testify to the applicant's identification. He questioned her on the lighting, distance, degree of attention, direction, and positions of all pertinent people.

20. Mr. Mock's cross-examination of Mrs. Skillern was not affected by the fact that he had attended the same high school.

21. The defense counsel personally purchased clothing for the applicant to wear during trial; there is no evidence to show this was demeaning or inappropriate attire.

22. Lisa Blackburn, the rape and robbery victim at whose home the applicant was arrested, identified the applicant sitting in the courtroom because she had spent over five hours in his presence, not because of any clothing he was wearing.

23. Defense counsel informed applicant that he had a right to testify in his own behalf, but advised him not to do so.

24. The applicant did not tell his trial counsel that he wanted to testify at either the guilt/innocence or punishment phases of the trial.

25. Counsels' advice not to put the applicant on the witness stand at either stage was the result of well-reasoned trial strategy. The trial attorneys reasonably believed that the applicant could not testify to

the events of the evening of the offense. They reasonably believed that putting the applicant on the witness stand during the punishment phase would have been counterproductive as they believed that the applicant would not make a sympathetic witness for himself.

26. The ultimate decision of whether or not to testify rested with applicant himself.

27. Trial counsel did not object to the State's challenge for cause of veniremen Olin Buz Cannon, Jim Jurado, Daniel Catnevert, and John J. Maguire, Jr., because these jurors had unequivocally admitted that they could never assess the death penalty.

28. Defense counsel did not request a limiting instruction concerning extraneous offenses at the punishment phase of the trial because they reasonably believed that there is no such instruction under Texas law.

29. Defense counsel did not object at the time of trial to the constitutionality of the Texas capital murder statute on any of the bases articulated in ground for relief "C" of Applicant's habeas corpus application.

30. The trial counsel made a reasonable investigation of the extraneous offenses admitted into evidence during the punishment phase. Mr. Mock did not know that one of the aggravated robbery victims, Ernest Doakes, was pushed out of his car in front of counsel's home because this fact was not in the official police offense report and Mr. Doakes did not discuss the facts of this case with Mr. Mock prior to trial.

31. While the court has read the applicant's exhibits C, D, and E, these psychiatric evaluations were conducted in July of 1986, a full five years after the commission of the instant offense. Nonetheless, they do not establish that the applicant was then or is

now incompetent. Further, the court does not believe that they are, **ipso facto,** mitigation evidence.

32. There is no credible evidence from any source to show that applicant was not of sound mind at or near the time of the offense in May, 1981.

33. On August 25, 1987, Dr. Jerome Brown once more conducted a psychiatric evaluation of the applicant. Once more Dr. Brown found the applicant competent, both to participate in an evidentiary hearing and assist his attorney. On two occasions applicant refused to cooperate with Dr. Brown in interviews held for the purpose of evaluating applicant's present competency to be executed.

34. There is no credible evidence from any source to indicate that Applicant is not competent to be executed under the standard enunciated in **Ford v. Wainwright,** 106 S.Ct. 2595 (1986).

35. This court has carefully considered (1) all psychiatric materials submitted by both the applicant and the respondent, and (2) the applicant's demeanor and abilities as he testified at the evidentiary hearing held January 8, 1988. While the reports from Dr. Dorothy Otnow Lewis and Dr. Jonathon H. Pincus suggest that the applicant is mildly brain damaged, of low intelligence, and has experienced "bipolar mood disorders," there is nothing in their reports or evidence from any other source to indicate that the applicant is either insane or that he does not know the fact of his impending execution and the reason for it.

CONCLUSIONS OF LAW

1. Defense counsel rendered reasonably effective assistance to Gary Graham in the investigation and preparation of his trial. Trial counsels' actions were

reasonable, based upon information supplied them by the applicant at the time of representation. **Strickland v. Washington,** 104 S.Ct. 2052, 2066 (1984); **Duncan v. State,** 717 S.W.2d 345, 348 (Tex. Crim. App. 1986).

2. Defense counsel were not ineffective for failing to request a third psychological evaluation of the applicant since two doctors had already examined the applicant, reached similar conclusions, and declared him both competent and sane. **Beans v. Black,** 757 F.2d 933, 936 (8th Cir. 1985); **Jennings v. State,** 647 S.W.2d 18, 21 (Tex. App. – Houston [1st Dist] 1982, pet. ref'd). Trail counsel had independently determined that the Applicant was sane and competent; they, more than any other party or the court, were in a position to evaluate the mental capacity of his client. **United States ex rel. Mirelies v. Greer,** 736 F.2d 1160, 1165-66 (7th Cir. 1984).

3. Since Ronald G. Mock did not have any personal relationship with the State's eyewitness, Bernadine Skillern, there is no credible evidence to believe that he had any conflict-of-interest in representing his client. **Cuyler v. Sullivan,** 446 U.S. 335, 348 (1980) (a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance). Defense counsel was not ineffective for failing to inform the applicant that he had attended the same high school as the witness. **Strickland,** *supra,* at 2065.

4. Trial counsel were not ineffective for failing to call four potential alibi witnesses whose names and addresses had never been given to them by the applicant. Trial counsel were not expected to investigate or produce witnesses about whose existence the Applicant did not inform his attorneys. **Jones v. Smith,** 599 F.Supp. 1292, 1300 (S.D. Ala., 1984), *aff'd*

772 F.2d 668 (1985), *cert. den.* 106 S.Ct. 838 (1986); **Cannon v. State,** 668 S.W.2d 401, 403 (Tex. Crim. App. 1984).

5. Since there is no credible evidence to prove, by a preponderance of the evidence, that the applicant was tried in inappropriate attire, counsel was not ineffective in this respect. **Strickland,** *supra,* at 2067 (any deficiencies in counsel's representation must be proven to be prejudicial to the defense).

6. There is no credible evidence to prove, by a preponderance of the evidence, that the applicant was prevented from testifying on his own behalf; thus, counsel was not ineffective in this respect. **Strickland,** *supra,* at 2065. Further, the defense counsel's rationale for advising the applicant against testifying was a reasonably effective trial strategy. **Strickland,** *supra* at 2065 (presumption that challenged action "might" be considered sound trial strategy).

7. The defense counsel were not ineffective for failing to object to the State's challenge for cause of veniremen Olin Buz Cannon, Jim Jurado, Daniel Catnevert, and John J. Maguire, Jr. Since they all unequivocally voiced opposition to the death penalty, they were unqualified to serve on a capital murder trial. **Lockhart v. McCree,** 106 S.Ct. 1758, 1760 (1986); **Johnson v. McCotter,** 635 F.Supp. 685, 688 (E.D. Tex 1986) (exclusion of veniremen who indicated that their views on death penalty would substantially impair their ability to function as jurors in capital case was proper, so that trial counsel was not ineffective for failing to object to their dismissal), *stay granted,* 107 S.Ct. 1262 (1987); **Marquez v. State,** 725 S.W.2d 217, 241 (Tex. Crim. App. 1987).

8. The defense counsel were not ineffective for failing to request a limiting instruction regarding the evidence of extraneous offenses during the punishment

phase of the trial as there is no such limiting instruction recognized in the Texas capital sentencing proceeding. *See, e.g.*, **Jurek v. Texas,** 428 U.S. 262, 274 (1976) (Texas capital sentencing procedure "guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a death sentence"); **Smith v. State,** 676 S.W.2d 379, 390 (Tex. Crim. App. 1984) (evidence of unadjudicated extraneous offenses admissible at penalty stage of capital murder trial); **Quinones v. State,** 592 S.W.2d 933, 947 (Tex. Crim. App. 1980), *cert. denied,* 449 U.S. 893 (1980).

9. Defense counsel were not ineffective for calling only two witnesses at the punishment phase of the trial since there was no evidence to prove more witnesses were known to the defense counsel and were available to testify on the applicant's behalf. **Strickland,** *supra,* at 2066 (trial counsel's actions based upon information supplied to him by the defendant at time of representation); **Jones v. Smith,** *supra,* at 1300; **Cannon,** *supra,* at 403; **Moore v. State,** 700 S.W.2d 193 (Tex. Crim. App. 1985) (defense counsel's failure to call witnesses at punishment stage of capital murder trial did not deny defendant effective assistance of counsel).

10. Defense counsel were not ineffective for failing to call Dorothy Shield, William Chambers, Mary Brown or Lorain Johnson, as there was no credible evidence to prove that the applicant had ever told his counsel about their existence as potential alibi witnesses or that counsel knew of their existence from some other source. **Strickland,** *supra* at 2066; **Mitchell v. Kemp,** 762 F.2d 886 (11th Cir. 1985), *reh'g denied,* 768 F.2d 1353 (1985). Although their affidavit recites that these witnesses heard the applicant tell them that

the applicant had told his defense counsel about the witnesses, the court does not credit this second-hand hearsay.

11. There is no evidence to prove that trial counsel failed to conduct a proper investigation into the facts and circumstances of the extraneous offenses admitted at the punishment phase. **Strickland,** *supra,* at 2060-61; **Ex Parte Carillo,** 687 S.W.2d 320, 324 (Tex. Crim. App. 1985); **Ex Parte Prior,** 540 S.W.2d 723 (Tex. Crim. App. 1976).

12. The evidence does not prove that the trial counsel provided ineffective assistance in failing to procure a third psychiatric examination. **Beans v. Black,** 757 S.W.2d F.2d 933, 936 (8th Cir. 1985); **Felder v. Estelle,** 588 F.Supp. 664, 671 (S.D. Texas 1984); **United States ex rel. Mirelies v. Greer,** supra.

13. The applicant's death sentence was not cruel and unusual punishment under the Eighth Amendment to the United States Constitution. There is no constitutional bar to the imposition of the death penalty upon one who was 17 years of age at the time he committed a capital murder. **Prejean v. Blackburn,** 743 F.2d 1091, 1098 (5th Cir. 1984); **Cannon v. State,** 691 S.W.2d 664, 678 (Tex. Crim. App. 1985); **Ferguson v. State,** 573 S.W.2d 516, 525 (Tex. Crim. App. 1978).

14. The applicant has failed in his burden of proving that the Texas death penalty statute is unconstitutional. He has offered no facts which would demonstrate that the Texas capital punishment system operates, either generally or as applied to him, in an arbitrary or capricious manner. **Kirkpatrick v. Blackburn,** 597 F.Supp. 1562, 1578 (E.D. La. 1984); **Ex Parte Maldonado,** 688 S.W.2d 114, 116 (Tex. Crim. App. 1985).

15. Further, Applicant is procedurally barred from attacking the Texas capital murder statute on the bases enunciated in ground for relief "C" of Applicant's writ of habeas corpus as defense counsel failed to object to the statute on any of those bases at the time of trial.

16. The Texas capital murder statute and sentencing scheme is constitutional. **Jurek v. Texas,** 428 U.S. 262 (1976). *See* **Lowenfield v. Phelps,** ___ U.S.L.W. ___ (U.S. January 18, 1988).

17. The applicant has failed to prove any facts that would demonstrate that challenges for cause under **Witherspoon** resulted in a systematic exclusion of blacks on his jury. **McCleskey v. Kemp,** *supra* at 1766-1767; **Ex Parte Maldonado,** *supra* at 116.

18. The applicant failed to raise any issue regarding the composition of the grand jury in a timely fashion. This complaint has been waived. **Francis v. Henderson,** 425 U.S. 536, 540-541 (1976); **Francis v. State,** 636 S.W.2d 591, 598-599 (Tex. App. – San Antonio 1982, no pet.).

19. The applicant's claim that the jury that convicted him was underrepresented by blacks and that the prosecutor systematically excluded blacks from the jury was not raised either at trial or on direct appeal. As a result, applicant is procedurally barred from raising that complaint at this time. Additionally, the rule in Batson is not available to a petitioner on habeas corpus review. **Allen v. Hardy,** 106 S.Ct. 2878, 2880-2881 (1986).

20. Further, the applicant has failed to establish a prima facie showing of discrimination in either the grand jury that indicted him or the petit jury that convicted him. **Batson v. Kentucky,** 106 S.Ct. 1712, 1722 (1986).

21. The applicant has not shown that the exclusion of all individuals under age 18 from the grand or petite [sic] jury has violated his right to a trial by an impartial jury drawn from a fair cross-section of the community. "Young adults" do not constitute a cognizable group; thus, their exclusion is constitutionally permissible. **Barber v. Pone,** 772 F.2d 982, 1000 (1st Cir. 1985).

22. The burden of proof in a habeas corpus proceeding is on the applicant. Applicant has wholly failed to meet his burden of proving that he is not competent to be executed.

23. The applicant has failed to demonstrate that his conviction was improperly obtained. Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be denied.

ORDER

THE CLERK IS ORDERED to prepare a transcript of all papers in cause number 335378-A and transmit same to the Court of Criminal Appeals as provided by Article 11.07 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. all of Applicant's pleadings in cause number 335378-A;

2. all of Respondent's pleadings in cause number 335378-A;

3. the Court's order;

4. the indictment, judgment and sentence in cause number 335378;

5. the affidavit of Mr. Ron Mock;

6. All psychiatric reports and exhibits filed in cause number 335378-A;

7. The transcript of the evidentiary hearing held January 8, 1988.

8. the entire appellate record in cause number 335378, the Statement of Facts and the transcript and the appellate opinion in cause number 335378;

9. the applicant's and respondent's proposed findings of fact and conclusions of law.

THE CLERK is further ORDERED to send a copy of this order to the Applicant.

Signed on this 9th day of February, 1988.

/s/ Donald D. Shipley
JUDGE PRESIDING

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illegible [SEAL]

EX PARTE
GARY GRAHAM

WRIT NO. 17,568-01

Application for a Writ of Habeas Corpus from HARRIS County

ORDER

This is an application for a writ of habeas corpus filed in this Court pursuant to Article 11.07, V.A.C.C.P. Applicant was convicted of the offense of capital murder and sentenced to death in cause number 335378 on October 30, 1981. On direct appeal the conviction was affirmed by this Court in an unpublished per curiam opinion. Graham v. State, No. 68,916 (delivered June 12, 1984). On July 13, 1987 applicant filed his Application for a Writ of Habeas Corpus in the trial court pursuant to Article 11.07, supra. The trial court, after conducting an evidentiary hearing on the application recommended that relief be denied and ordered the record transferred to this Court. The application along with an application for a stay of execution was duly received in this Court.

Today the applicant contends that he was denied the effective assistance of counsel at trial in several particulars. First, he claims that the attorneys failed to interview all of the witnesses including those whose names he had supplied them. Included in this latter group was four alibi witnesses who were never interviewed nor called to testify. At the evidentiary hearing this subject was covered in depth. Applicant testified that he gave these witnesses' names to the attorney but that they were not called. He also testified in conjunction with another allegation that he was not called as a witness at either phase of his trial by his attorneys even though he requested to

testify since his attorneys knew that he would inform the court of these witnesses and trial counsels' derelictions. Both attorneys denied that they were ever given any of these names other than those whose testimony they did investigate. According to the lawyers' testimony none of the witnesses that they or their investigator spoke with, with a few exceptions, wanted to testify. We find that the preponderance of the evidence adduced at the evidentiary hearing supports the trial court's findings that the attorneys fully investigated every witness of which they had knowledge.

Applicant also alleges that his attorneys were ineffective because they failed to obtain independent psychological and psychiatric examinations of the applicant which would have shown that applicant was of subnormal intelligence and was suffering from organic brain damage and dysfunction. The record reflects that applicant was examined at his request prior to trial on two occasions, both of which revealed that applicant was competent to stand trial and sane at the time of the offense. At the hearing both attorneys testified that they had no reason to believe that the results of those examinations were erroneous. In an abundance of caution the trial court had applicant examined as to his competency prior to the evidentiary hearing. No evidence of incompetency was found. We overrule applicant's contentions regarding his competency and sanity.

Applicant next contends that his lead counsel was personally acquainted with the state's key identification witness which caused him problems in conducting a searching cross-examination. At the hearing the attorney specifically denied that he knew the witness as alleged

and that his cross-examination was in any way affected. Applicant has not carried his burden of proof on this allegation and we overrule it.

Ineffective assistance of counsel is also alleged in that the attorneys allowed the applicant to be tried in the very same clothes in which he was arrested thus making identification easier. It must be pointed out that applicant was arrested in the home of a victim of a sexual assault he had just perpetrated. He had fallen asleep on her bed after committing the act at which time she called the police who affected the arrest. At the time of his arrest, applicant was not wearing clothing. It is hard to imagine that he was tried dressed in this fashion. However, applicant's attorney testified that he personally purchased the clothing that applicant wore at trial. Applicant testified that his mother had purchased the clothing he was wearing at trial. We find no support for applicant's assertion in the record of the evidentiary hearing and overrule the contention.

Applicant next alleges that the attorneys refused to allow him to take the witness stand at both the guilt or innocence and punishment phases of the trial. The attorneys, at the hearing, testified that they did strenuously advise applicant not to testify. They also denied applicant's assertion that he had requested to testify. We find no merit to this allegation.

Next applicant asserts that his attorneys failed to develop a "proper" trial strategy. Specifically he maintains that they erred in failing to object to the state's challenge for cause of four venirepersons. This was not developed at the hearing in any depth. However, one of

the attorneys testified that he felt that any objections to the particular venirepersons would have been frivolous. We find nothing within the record to indicate that their testimony was wrong and overrule this allegation.

Applicant further asserts that his counsels erroneously failed to request limiting instructions to the jury as to extraneous offenses introduced at the punishment phase of trial. We find no merit to this allegation.

Further applicant contends his attorneys were ineffective since they did not investigate the extraneous offenses that were admitted at the punishment phase of the trial. No allegation of what such an investigation would have shown is made at this time. In fact, at the evidentiary hearing applicant admitted that some of the extraneous offense, without specifying which ones, were crimes which he committed. There are insufficient factual pleadings to warrant relief. We do not find that applicant was afforded ineffective assistance of counsel at his trial.

In his next allegation applicant contends that he should not be executed since execution of one who committed capital murder when he was seventeen years of age is cruel and unusual punishment. In Ferguson v. State, 573 S.W.2d 516 (Tex. Cr. App. 1978) we held that youth alone would not prevent the imposition of the death penalty. See also Cannon v. State, 691 S.W.2d 664 (Tex. Cr. App. 1985). We overrule this contention.

Applicant next contends that the Texas death penalty statute is violative of due process for several reasons. First he alleges that the lack of a sentence review offends due process. However, the United States Supreme Court has held that such sentence review is not required of the

states. Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871 (1984). We agree. Next he contends that the charge did not contain language directing the jury in their consideration of aggravating and mitigating factors. We rejected this argument in Stewart v. State, 686 S.W.2d 118 (Tex. Cr. App. 1984) and will adhere to that decision.

In this same allegation applicant contends that trifurcation of the trial is required to allow consideration of mitigation and argument. We reject this contention as being without merit. Additional argument is not required. He also maintains that the jurors should be informed of, the results of their answers to the special issues. The record in this case reflects that they were in fact so informed. There is no merit.

Continuing the same allegation the applicant maintains that unadjudicated offenses should not be admissible at the punishment phase of a capital murder trial. In DeLuna v. State, 711 S.W.2d 44 (Tex. Cr. App. 1986), at 47, we wrote, "Proof of unadjudicated, extraneous offenses is admissible in the punishment phase of a capital murder trial, absent a showing that the defendant is unfairly surprised by such evidence." No such showing of surprise has been made in this case. There is no merit to this contention.

Lastly in this allegation applicant contends that exclusion of prospective jurors pursuant to Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) results in the exclusion of blacks in a discriminatory manner since a higher percentage of black people are opposed to the death penalty than those of other races. No support for this proposition is tendered and we find nothing upon which to grant relief. The contention is therefore overruled.

Applicant also contends that he has been denied due process, equal protection and the right to be free from cruel and unusual punishment since the grand jury and petit jury contained an underrepresentation of black people. No proof of this underrepresentation was shown. We reject the allegation. He also contends that the state used their challenges for cause and their peremptories to strike all blacks and young people from the jury. Again, no support for this proposition can be found in the record and we decline to speculate.

Lastly applicant contends he is not competent to be executed for his crime. However, as pointed out above, applicant was examined immediately prior to the evidentiary hearing with no indication of incompetency being found. This allegation is overruled.

Finding no merit in any of the applicant's contentions before this Court, we deny his application for a writ of habeas corpus. Given our action of this date we also deny the application for a stay of execution.

IT IS SO ORDERED THIS THE 19TH DAY OF FEBRUARY, 1988.

PER CURIAM

En Banc

Clinton, J., would grant a stay of execution and further proceedings pending final disposition of Franklin v. Lynaugh by the Supreme Court of the United States.McCormick, White and Duncan, JJ., not participating.

Do Not Publish

NO. 335,378

THE STATE OF TEXAS	)	IN THE DISTRICT COURT OF
VS.	)	HARRIS COUNTY, TEXAS
GARY GRAHAM	)	182ND JUDICIAL DISTRICT

MOTION TO HOLD ARTICLE 37.071 OF THE TEXAS CODE OF CRIMINAL PROCEDURE UNCONSTITUTIONAL AND VOID

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the Defendant, GARY GRAHAM who by and through his undersigned counsel respectfully moves this Honorable Court to hold Article 37.071 of the Texas Code of Criminal Procedure unconstitutional and void on the grounds that said article, which sets forth the procedures for the imposition of the death penalty, is violative of the Defendant's rights to be free from "cruel and unusual punishment" and to be free from arbitrary and capricious punishment, guaranteed by the Eight [sic] and Fourteenth Amendments to the Constitution of the United States, and further that said Article 37.071 is so vague and indefinite as to deprive the Defendant of "Due Process of Law" and "fundamental Fairness" guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, and as grounds therefor the Defendant would respectfully show unto this Honorable Court the following:

I.

That the Defendant has a federally secured right to be free from the imposition of "cruel and unusual

punishment" in violation of the Eight [sic] Amendment to the Constitution of the United States. The State has indicated it will seek to impose the penalty of death in the instant case which is just such a punishment.

II.

That the Defendant has a federally secured right to be free from punishment imposed arbitrarily and capriciously in violation of the "due process" clause of the Fifth and Fourteenth Amendments to the Constitution of the United States. The special issues procedure set out in Article 37.071 allow total discretion to a jury to make unfavorable findings against a Defendant, and such findings may be based on any prejudices the jury may have, individually or as a whole.

III.

That Article 37.071 is so vague and indefinite as to be incapable of interpretation by reasonable men and is therefore facially void as violated the Defendant's right to "due process" of law and fundamental fairness" guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States. Such terms as "conduct. . . . committed deliberately", "resonable expectation", and "probability" can have no meaning for the average juror and consequently death could result fir [sic] the Defendant without any true or reasonable version of the process or fundamental fairness.

WHEREFORE, the Defendant, GARY GRAHAM, respectfully moves this Honorable Court to hold Article

37.071 void and unconstitutional on its face and as applied and for such further relief as this Honorable Court may deen [sic] just and proper.

Respectfully submitted,

ATTORNEY FOR DEFENDNAT [sic]

/s/ Ronald G. Mock
RONALD G. MOCK
609 Fannin, Suite 2129
Houston, Texas 77002
(713) 223-2660
S.B.O.T. #14242700

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Motion to Hold Article 37.071 of the Texas Code of Criminal Procedure Unconstitutional and Void has been delivered to Assistant District Attorney, Carl Hobbs, Harris County Courthouse, Houston, Texas, this 13th day of July, 1981.

/s/ Ronald G. Mock
Ronald G. Mock

ORDER

On this day the above Motion to Hold Article 37.071 of the Texas Code of Criminal Procedure Unconstitutional and Void, having been presented to the Court the same is hereby (GRANTED) (DENIED).

/s/ Illegible
JUDGE PRESIDING

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NO. 335,378

THE STATE OF TEXAS) IN THE DISTRICT COURT OF
VS.) HARRIS COUNTY, TEXAS
GARY GRAHAM) 182ND JUDICIAL DISTRICT

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO HOLD ARTICLE 37.071 OF THE TEXAS CODE OF CRIMINAL PROCEDURE UNCONSTITUTIONAL AND VOID

TO THE HONORABLE JUDGE OF SAID COURT:

In *Furman v. Georgia* (1972) 92 S. Ct. 2726, the United States Supreme Court clearly de ineated [sic] the Eight [sic] Amendment guidelines relating to "cruel and unusual punishment" as they related ti [sic] the imposition of the penalty of death in a criminal proceeding.

> "It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudice." *Furman v. Georgia, Supra*, at P. 2728."

Article 37.071 of the Texas Code of Criminal Procedure, which sets out the procedures by which the death penalty is to be imposed "gives room for the play" of just such prejudices. Article 37.071 leaves with both the judge and the jury a vas [sic] residue of discretion which is precisely what the Supreme Court in *Furman* condemned.

Article 37.071 proves in pertinent part that "(I)n the proceeding, evidence may be presented as to any matter that the Court deems relevant to sentence". Where are the stringent guidelines for the judge's discretion which would seem to be required by *Furman*? They are nowhere to be found in the language of Article 37.071.

While the special issue submission may to some extent insulate the jury from having to assess the punishment, the issues the jury must determine are vague, standardless, and confusing. Consequently, the inquiry is fraught with standardless discretion in the hands of the jury.

Article 37.071 (b) (1) inquires of the deliberate commission with the reasonable expectation of death, which (b) (3) inquires of the Defendant's provacation in killing the deceased. Can the State argue for a favorable finding as to (b)(1) where it has in its possession evidence favorable to the Defendant on (b)(3)?

Special issue number (b)(3) refers to whether there is a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society. Is the propensity to commit such acts limited to the facts of the instant case, or is the State of Liberty to introduce extraneous evidence? And if so, what are the limitations on such evidence? Further, what is "probable commission" as opposed to possible or suggestive commission? Do the acts of violence have to be the same or similar to those for which the Defendant is on trial? How many extraneous acts of misconduct or offenses will the Court allow for proof of future conducts? How does one

measure future conduct or the propensity of any individual to commit future acts? Is the state of the psychiatic art such that we can make such predictions with any kind of reliability?

This ambiguity, this residue of discretion left by Article 37.071, is precisely what the Supreme Court in *Furman* sought to condemn.

> (W)e know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied feeding prejudices against the accused if he is poor abd [sic] despised and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position." *Furman v. Georgia, Supra,* at p. 2735.

GARY GRAHAM is an indigent, lacking the social or political clout or prestige of "those who by social position may be in a more protected position." Article 37.071 allows for the prejudices, biases and fears of the jury to selective feed against this accused. Accordingly, this Honorable Court should hold Article 37.071 of the Texas Code of Criminal Procedure unconstitutional and void.

Respectfully submitted,

/s/ Ronald G. Mock
Ronald G. Mock
609 Fannin, Suite 2129
Houston, Texas 77002
(713) 223-2660
S.B.O.T. #14242700

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Memorandum in Support of Defendant's Motion to Hold Article 37.071 of the Texas Code of Criminal Procedure Unconstitutional and Void has been hand delivered to the Assistant District Attorney, Carl Hobbs, Harris County Courthouse, Houston, Texas, this the 13th day of July, 1981.

/s/ Ronald G. Mock
Ronald G. Mock

In The District Court Of Harris County, Texas,
182nd District

(Caption Omitted In Printing)

[p. 28] MS. CAROLYN VONGONTEM ALTMAN, called as a prospective juror, having first been duly sworn, testified as follows:

THE COURT: Are both sides ready?

MR. HOBBS: We're ready.

MR. MOCK: The Defense is ready.

QUESTIONS BY THE COURT

Q Ms. Altman, this is the Courtroom I normally am in, and I feel more comfortable talking to you here. Is there anything before I get into the individual questioning, is there anything I discussed in the general comments to the jury that presented any problems to you as far as your understanding was concerned? Do you understand the principles that I talked about with regard to the presumption of innocence and the burden of proof and the purpose of the indictment, the right of the Defense to remain silent and not present any testimony; the function of the different participants in the trial, any of that that presented any problems to you?

A No.

Q Do you understand my discussions with you with regard to the fact that this is a capital murder [p. 29] case, and the fact that if you are to serve as a juror on this case, there is a possibility that you would have to consider the possibility of the death penalty in this case, do

you understand that is a fact and question that has to be answered?

A Yes.

Q Let me explain to you, Ms. Altman, the way in which you would consider this. As I stated here, in Texas we have a two stage system. In a capital murder case, if the jury returns a guilty verdict on the guilt or innocence phase of the trial, that we talked about, we then move to the punishment phase. As I told you previously, there are only two alternatives that the jury would have. You're past guilty or not guilty. You have already decided that the defendant is guilty of capital murder. You then enter the punishment phase, and the jury has only two alternatives. They can say, "We recommend life in the Texas Department of Corrections," or, "We recommend death or capital punishment." Now, the jury does not just return a verdict form saying, "We recommend death as a punishment for capital punishment." What the jury [p. 30] does is answer two special issues. In some situations there are three. If you do serve as a juror in this case, and you get to the punishment phase of the trial, and the jury has found the defendant guilty of capital murder, you will have to consider at least two special issues, and those special issues are, take a look at the bulletin board up here and I would ask you if you would to [sic] look at special issue one and two on the board up here. The first special issue, whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the deceased or the death of another person would occur. That is the first special issue. So obviously, the first issue you, as a juror, would have to consider is whether or not

the actions that the State will attempt to prove to you with regard to Mr. Graham's alleged killing the complainant in this case, Mr. Bobby Grant Lambert, whether or not the act that caused the death of Mr. Lambert was committed deliberately and done with a reasonable expectation that Mr. Lambert's death or another would occur. So that is the first [p. 31] special issue that the jury would answer. Obviously you answer that either yes or no. Now, if the jury –

A I understand the deliberately [sic]. What was the last part of that?

Q With a reasonable expectation that the death of the deceased or another person would occur.

A Okay.

Q So really, I guess you would have to say there are two portions to that special issue, and in this situation would it be did Mr. Graham deliberately shoot Mr. Lambert with a pistol and number one, did he do it deliberately and number two, when he shot him, did he do it with a reasonable expectation that Mr. Lambert would be killed or that another person would be killed. So that is the first issue the jury has to answer. If they answer the issue yes, they then move to the second special issue, and this is more or less, will cause you to be a soothsayer to look in your crystal ball and decide something with regard to the defendant. Whether there is a probability, it doesn't say a possibility, it doesn't say a certainty, is says whether there is a probability that the defendant will commit [p. 32] criminal acts of violence that would constitute a continuing threat to society. So obviously, what you have to look at would be the facts on the guilt or

innocence of the trial with regard to a particular charge against him, and if there was any other testimony that the Court deemed proper for you to hear with regard to either the defendant's criminal background, if we had any with regard to any other criminal offenses the defendant may have committed, if he did commit any other offenses, it would be at that time that that testimony would be proper for you to consider on how to answer special issue number two. And once again, the jury will answer special issues number one and two either yes or no. Now, this is the way our system works. If the jury answers special issue number one yes that the act that caused the death of Mr. Lambert was committed deliberately and with a reasonable expectation that he would be killed, if you answer that question yes or that special issue yes, and move to the second special issue and you felt there was sufficient evidence to show you that the defendant would commit a criminal act of violence and that special issue [p. 33] would be answered yes. If in that instance and only in that instance would the death penalty be the punishment. In other words, this is not a shell game where there is anything that is going to be hidden from the jury's mind. If you serve as a juror you would know through the entire proceeding, know if you answered both of the special issues one and two yes, I would have no discretion. The Judge has to assess the punishment at death for capital punishment. Okay. If the jury were to answer special issue one or two no, then I would assess life as a mandatory punishment. Two yes call for the death and one or two no answers call for life in the penitentiary. Does any of that present any

problems to you? Do you understand what I am talking about?

A Yes, I do.

Q The question I must ask you and the one that I talked to you about before is, and I have to frame it this way because the way I also embodied this question, Ms. Altman, do you have conscientious, religious or moral scruples against the infliction of death as a punishment for a crime in a proper case? We are talking [p. 34] about three areas. Do you have any conscientious, religious or moral scruples against the infliction of death as punishment in a proper case, that is not to say that it is the proper punishment in all capital murder cases or any other type of case. Once again, we can't go into the facts of this case. You have to conjure up a situation in your mind. Could you consider that as a punishment in a proper case?

A Yes, I could.

Q So, what you are telling me, then, you have no conscientious, religious or moral scruples that would prohibit you from voting for answering, answering those special issue questions, if you felt it was the proper punishment, is that what you are telling me?

A Yes.

Q Is there anything I have gone over up to this point that, Ma'am, that is uncertain in your mind before I turn you over to the lawyers for their examination?

A I don't think so.

THE COURT: Mr. Hobbs, will you proceed?

[p. 35] EXAMINATION BY THE STATE

QUESTIONS BY MR. HOBBS:

Q Good afternoon, Ms. Altman. My name is Carl Hobbs, and I am Chief Prosecutor in this Court. And this is Mr. Armondo Orte, an intern in our Court, and he will be helping, and Ms. Poppy Northcutt. They are students and possibly there will be two other Prosecutors, Mr. Mike Addudel, whom you have not met as of yet and Mr. Joe Magliolo. Now, as the Judge has told you, this is a capital murder case where upon a conviction for capital murder that the only sentence that is possible is either life or death, and the Judge has gone over that with you. Now, during this phase of the trial, as the Judge told you, there are no right or wrong answers. Each side has to represent their particular client and has to ask questions in order to exercise their peremptory challenges, in order to see if you would be a fair and impartial juror for both sides. So, there are no right or wrong answers, and please be frank and honest with us and tell us how you feel about it, because that is the best way for each of us. We wouldn't want you sitting on this jury trying to make a decision [p. 36] that you couldn't do. Well, the first phase of the trial, as the Judge has told you, he broke it down into two phases. The first phase is guilt or innocence. During that phase of the trial, the State must prove beyond a reasonable doubt the elements of the offense. As the Judge told you, there is no definition of it. No legal definition for what reasonable doubt is or is not. It is just good common sense. I can tell you a few things it is not. It is not proof beyond all doubt or beyond a shadow of a doubt, as you may have heard on television. I think you will agree with me if it was beyond all doubt you

would have to be present at a particular instance to see it, yourself, before all doubt would be removed, and if you were in fact in that position, you would be a witness and not a juror. Do you have any problem with that concept?

A No, I don't believe so.

Q Okay, now, conflict, conflict can exist between say, the people in this room. If someone came running through that door right now and threw something across the room and then ran out the door there. Okay, and then everyone was asked [p. 37] to describe that person. Okay. All the people in this room, I doubt very seriously, and I think you would agree with me, that most of the people here would give different descriptions or have seen different things at a given time, depending on where they were and their opportunity to observe the defendant at a given time. Would you agree?

A Yes, I would.

Q So, there would be conflict at some time. Conflict, in and of itself, I offer you this proposition is not reasonable doubt. Would you agree with that?

A Sir, would you repeat that?

Q Conflict in and of itself is not reasonable doubt. Conflict as to the descriptions as the example I gave you of the person coming in, depending on where that person was.

A Okay.

Q Now, your job as a juror is to look at the witnesses, judge their demeanor, their motives, and to make, to accept what they say, all of what they say as being the

truth fully, part of what they say or absolutely nothing. You judge the credibility of the witnesses. That is your job [p. 38] as a juror. Now, when we are coming back into – and to determine what the facts are, you are going to hear, and there might be conflict. Conflict, in and of itself, is the juror's job to determine that conflict. Do you understand that?

A Yes.

Q There might be different stories as to what happened. It is the jury's job to determine what has happened so conflict in and of itself is not necessarily reasonable doubt, but the jurors must resolve conflict, do you understand that?

A Yes, I do.

Q The burden of proof is upon the State, but that is beyond a reasonable doubt. Beyond a reasonable doubt as to what the elements of the offense are. That and only that. We don't have to prove what color fifty cars were coming down the North Freeway at a given hour as part of the case or what witness number five was wearing that evening. It's the question that the law allows. And what are those elements. They are the elements that are set out in the indictment. Now, for purposes of where we are going here, I have got a little [p. 39] chart, and if this is too far, can you read these?

A Oh, yes.

Q The first thing the State must prove beyond a reasonable doubt is that it was the defendant, Kenneth Stokes or Gary Graham, alias Gary Graham. Alias Kenneth Stokes, that it was him that committed the offense,

beyond a reasonable doubt; that it occurred in Harris County, Texas; and that it was on or about May 13, 1981. On or about that date. It doesn't have to be – it could be a few days before or within the statutes of limitations. Does that present any problems?

A No, it doesn't.

Q Then we go on to several other elements here. Whether the defendant did then and there unlawfully while in the course of committing or attempting to commit the robbery of Bobby Grant Lambert, the complainant in this case. Now, in the course of committing or attempting to commit, now it will read that way, but in the charge you will be instructed by the Judge or either one of the two. Okay. Any problem with that thus far?

A No.

Q Now, we go on to the rest of the elements. Now, these are the things we are talking about as [p. 40] proof beyond a reasonable doubt. That and only that. That he intentionally caused the death of Bobby Grant Lambert. It was an intentional act, not an accident, not any defensive theory, but an intentional act. Okay?

A Okay.

Q By shooting Bobby Grant Lambert with a gun, as the last element. Okay?

A Okay.

Q Now, those are the things that the State must prove to you beyond a reasonable doubt. Those and only those. Do you have any problems with that?

A No, I don't.

Q You can see that would eliminate what type of clothes the witness was wearing or how many police officers or whatever –

MR. MOCK: I object. That is one of the purposes of the jury and only for the jury to determine whether or not that conflict is enough to raise reasonable doubt.

THE COURT: That is sustained.

Q Now, in the course of committing theft. We are going to be talking about this. What is capital murder? Capital murder consists of murder plus [p. 41] as the Judge told you some other felony offense. So when we are talking about that, and murder can be in a shorthand rendition, it's the voluntary killing of another human being without excuse or legal justification. That is a shorthand rendition of what murder might be. Then we will have something else. In the course of committing or attempting to commit robbery. As we have in the elements, now we come into the course of committing theft, as the definition for robbery, that means conduct which occurs in an attempt to commit, during the commission of or in the immediate flight after the commission of the theft. So either in an attempt, if I came up to the Court Reporter here and pulled a gun and demanded her purse and never got it before I shot her and ran, that would still be aggravated robbery, and then if my shot killed her, capital murder. Or I could go demand the purse, take the purse, then shoot. Capital murder. Or demand the purse, take the purse, move back and then shoot her. Okay?

A Okay.

Q Or afterwards. Do you have any problems with that?

[p. 42] A No, I don't.

Q So, in an attempt where no money, nothing, no property had to be taken at all, then it still can result in the offense having been committed. Do you have any problem with that?

A No, I don't.

Q Okay. Now, you realize when the Judge was going over the rights of the defendant, he was talking about certain things, presumption of innocence. That presumption of innocence is in fact there until the State proves the case beyond a reasonable doubt as to each and every one of those elements. Now, the State can't call the defendant to the stand. You realize that?

A Yes, I do.

Q And he doesn't have to take the stand. If he doesn't take the stand, you will be instructed that you cannot consider that for any purposes. Do you understand that?

A Yes, I do.

Q If he should testify, and he does not have to and the law says he doesn't have to, then you should judge his credibility as you would any other witness. Do you have any problem with that?

[p. 43] A No.

Q Okay. I mean what I am saying is you wouldn't look at him any different or give him some special rights that you wouldn't give another witness or less rights than another witness?

A Well, my hesitation was if he didn't testify there was nothing to judge, I had nothing to base an opinion on.

Q Okay, now, as part of that right both the State and the Defense have the same rights to call or not to call witnesses. Okay, it's the State's burden to prove the case beyond a reasonable doubt. They don't have to prove anything. They can sit there and not ask one question, okay?

A Okay.

Q And that – but they have the same powers to call or not to call or to call witnesses if they desire to. That goes for both sides. Do you understand that, Ma'am?

A Yes, I do.

Q Now, when we are talking about in the concept of robbery and what we have talked about, the elements of the offense, do you have any problems with that?

A No.

[p. 44] Q Okay. Now, and we have talked about in the course of and no problem there and committing theft, which means it can be before, during or after?

A Yes.

Q No property has to be taken before robbery can occur?

A Okay.

Q Looking at the issue of whether or not capital punishment should go, as the Judge has told you, in the first instance now when we are talking about intentional, that will be defined for you, the word intentionally caused the death.

A Okay.

Q That is an element of the offense, and it is defined as a person acts intentionally or with intent with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. So that is an intentional act. The State must prove to you that murder, the killing was an intentional act by the defendant before you can find the defendant guilty of capital murder, okay?

A Okay.

[p. 45] Q Any problem with that?

A No.

Q Now, one of the aspects to – this is an important consideration. The law says and allows, and if you believe, you, as a juror, judge the credibility of the witness and determine the facts, the Judge rules on the law, what you have is, if you believe beyond a reasonable doubt and I'm going to give you a hypothetical, that the State presents a single witness, okay, who testifies and testimony is evidence for consideration by the jury. Okay, from the witness stand, as sworn testimony, if you believe that person beyond a reasonable doubt, and the State has proved each and every element beyond a reasonable doubt as the law requires, could you, if you believe that

beyond a reasonable doubt, base a conviction upon the testimony of a single witness?

A I would say yes.

Q Okay, you hesitated a little bit.

A I haven't been asked these questions before. I haven't thought about them.

Q But that doesn't pose a problem if you believe that person beyond a reasonable doubt?

[p. 46] A That is correct.

Q Okay, now, so we are looking at – then we are going into the other aspect. We are in the first phase of the trial, and the first phase of the trial is whether or not the State has met its burden as to each and every element. Now, is there any reason in your mind, Ma'am, why you would tend, if you believed the State had proved each and every element as the law requires, of their case in the guilt stage of that, of the trial, would there be any reason, for any religious, conscientious or moral reason why you would not follow the law if you believed beyond a reasonable doubt each of these things and find the defendant guilty, knowing that upon a finding of guilt, guilty of capital murder, that there are only two punishments, life or death? Would that fact, knowing that as the Judge has told you, would that preclude you from following what you believed to be true and following the law and the instructions of the Court?

A No, it wouldn't.

Q Now, we are going into the second phase now. Where we are going to be looking at two issues, at the

punishment phase of the trial. Now, during [p. 47] this phase of the trial, the law allows you to use the testimony and the evidence that was presented at the first phase of the trial in answering your questions as to the second phase of it, okay?

A Okay.

Q It also allows other evidence to be brought to you if any evidence as to prior criminal record, acts of violence, other reputation testimony that would help you in answering the questions to the special issues that the Judge has gone over with you. Do you have any problems with that?

A No.

Q Okay, so when we are looking at special issue number one, whether or not the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased would occur, okay, I'm going to leave out of another. Now, when answering that question, the Judge is not going to define deliberately for you. It won't be defined in the law. Deliberately doesn't mean premeditation. Webster's Dictionary defines it as willful or voluntary. It doesn't [p. 48] mean accidently. [sic] Okay. So, do you have trouble with the word deliberately?

A No, I don't.

Q And looking at the facts of the case, now you are going to have to suppose with me, now, you have heard the facts in the first phase of the trial, and having believed those beyond a reasonable doubt and the State

had met its burden, you found that the defendant has been guilty of capital murder. Okay?

A Okay.

Q Murder in the course of an aggravated robbery or robbery. So you have some action, and you are going to have found intentional. Intent in and of itself does not mean deliberately. Okay, but what I am saying is that you can take the entire consequences of that, plus whatever evidence may be brought to you during that phase to answer question number one. Do you have any problems with that?

A No.

Q And with the word deliberately?

A No problem.

Q Okay, as an example, if I came back and I held the gun and I was waiving a gun around here and [p. 49] I trip against the wall and it fell and hit her and shot and killed the Court Reporter, the actions probably wouldn't be deliberate unless by my actions, or if I came back up and just walked up and pulled it, walked up and shot her. By testimony that may come out during the course of a trial that would aid you in answering the question, do you have any problems with that?

MR. MOCK: Excuse me, at this time for the sake of clarity for the record and myself, I wanted to make sure which one Mr. Hobbs indicated would be deliberately. I think he said when he came around the corner and stumbled and dropped the gun and hit her and he mentioned another hypothetical on that may have also been deliberately – for my own information.

THE COURT: I think Mr. Hobbs was indicating a situation where you pull the gun deliberately and walk up and point it at the individual, that is a deliberate act. The other was accidental.

QUESTIONS CONTINUING BY MR. HOBBS:

Q And the act could still be deliberate at some range in between those two, would you not agree?

A Yes.

[p. 50] Q Okay, now, when we go into special issue number two, most likely, the most special issue that could be answered by the jury, or three, the three that are listed here. Most likely just two, but we are going to look at all three, but primarily concentrate on the first two.

MR. MOCK: Your Honor, I make an objection. The Court will determine whether the third issue is raised by the evidence, and I would request that the venireperson be voir dired on all three issues because in our examination it will be raised by the information.

THE COURT: It is a certainty if we do reach the punishment phase of the trial you will have to consider special issue one and two. The jury would only consider special issue number three with response to provocation on the defendant's actions only if it's raised by the evidence during the trial. So it's a certainty you would consider the first two. It is uncertain at this time by virtue of the fact that neither I or you are familiar with the facts that number three is proper, but it is necessary that we instruct you as to three in the event it becomes proper. You may proceed.

[p. 51] Q The second special issue whether is a probability that the defendant will commit criminal acts of violence that will constitute a continuing threat to society. Now, probability will not be defined. It doesn't mean absolutely. It is probable, or more than likely. Okay?

A Okay

Q The word is open for definition. Once again, by the actions and by the – could you base your verdict in the punishment stage upon the evidence that you heard during the first phase of the trial? What I am saying is that the actions of the defendant whose conduct during that period of time from the time that you heard, could you consider that in answering special issue number two?

A I don't understand the question.

Q In issue number one, the point of deliberately, okay, and in number two is there enough evidence provided at that point?

A It can or cannot.

Q Yes, Ma'am. What I am saying is that you are going to be asked whether there is a probability that the defendant would commit criminal acts of violence. Now, criminal acts of violence [p. 52] wouldn't be defined. That can be anything from an assault, if I go up and just touch him, that is a criminal act of violence and an assault. Come back and hit him, cut him, shoot him, rob him, these are criminal acts of violence. I walk up and tore off the rail around the Judge's Bench, that is an act of violence to property. It can be to property. Okay?

A Okay.

Q So, in testimony both from the first phase of the trial and also the testimony that could come in as to the defendant's reputation, and prior conduct, or what may be presented during that phase of the trial. Do you have any problems with that, Ma'am?

A I feel as if I would need more evidence, more questions or whatever about prior history of the person. I could not, I don't think I could base the decision totally on the evidence in phase number one.

Q Not knowing what that is?

A Not knowing what happens, what the evidence is in number one, I think it would be difficult for me to decide on punishment.

Q Okay, but would desirable testimony as to [p. 53] reputation and acts at or near the time of the occurrence of this, that would help you?

A Yes.

Q Now, probability doesn't give you any problem?

A No.

Q It doesn't mean for certain or absolutely, but more than likely, okay?

A Yes.

Q As to special issue number three, if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation by the deceased. Now, that is only if the person that was killed by the act of the defendant caused that act in some way by some provocation or unreasonable, but

you are asked was the defendant's response, what he did in causing that death unreasonable to the provocation if there was any. If there was some act, okay, now once again, that is not defined. But using your good common sense, now from the standpoint, do you have any problems with that concept?

A No.

Q Okay. Now, from anything we have discussed thus far, do you have any questions or any [p. 54] problems with anything, Ma'am?

A No.

Q Okay, now, as the Judge told you, if you voted yes as to special issue number one and yes as to special issue number two, because there is going to be a minimum of two special issues, if there are three, then yes to all three, that the defendant's conduct was unreasonable, so you are going to get yes answers to the special issues whether it be two or three will result in a death sentence for the defendant. Knowing that, that death would result if the jury unanimously agreed on yes answers as to the special issues presented, would that fact, you as an individual juror, cause you to disregard the testimony, even though you had believed that beyond a reasonable doubt, and that is the burden here, also the burden in on the State to prove the special issues. Once again, it is our burden, not the Defense, our burden, it hasn't switched, and it never will. That the act was deliberate, proved beyond a reasonable doubt, and you believed that hypothetically, you believed that was true, and you further believed that special issue number two is and was answered in the [p. 55] affirmative as yes, that he would

probably commit future acts of criminal violence, would there be any reason, knowing that death would result, that would cause you to not to vote yes, even though you believed yes to be the proper verdict and proper answers as to each of those special issues?

A Never having been in this situation, I don't think it would, but depending upon the evidence.

Q What I am saying, if it is based upon the evidence, but what I am saying, I'm giving you a hypothetical, I am saying you believed that, you believe that the State has, in fact, beyond a reasonable doubt, proved to you with evidence that the answers should be as to one and two, yes, okay, my question to you is if you believed that and taking that as a given fact, would there be any reason that only you can know that would cause you to say, "I will not do it, even though I believe it should be answered yes because I know death is going to result."

A No.

THE COURT: Anything further, Mr. Hobbs?

MR. HOBBS: No, Your Honor.

Q You have never, the crime you were a victim of [p. 56] about six years ago, is there any reason that would cause any problems?

A That was a crime of my brother's, not mine.

MR. MOCK: Pardon me?

A The crime was to my brother, not to me. I think the question was to me or any relative.

MR. HOBBS: Thank you. The State passes the witness.

THE COURT: Mr. Mock?

EXAMINATION BY THE DEFENSE

QUESTIONS BY MR. MOCK:

Q If it please the Court, Ms. Altman, I, too, would like to thank you for your participation in our criminal justice system. And in a way of introduction, some of the questions I ask may be a little personal, but please believe me, we are not trying to delve into your private life, and none of the answers that you give are going to be the wrong answers. What we are trying to do, certainly from the State's standpoint and from the Defense's standpoint, is find twelve impartial persons that can listen to the evidence and make a decision one way or the other. So, some of the questions may seem [p. 57] personal, and we appreciate, also, your filling out the form and this helps a lot in asking questions. Gary Graham is charged with the offense of capital murder. Is there anything about that word, the wording that it's capital murder, meaning, as the State has outlined there are various ways to commit capital murder, and the State has to prove each element of that offense. Is there anything about the offense, itself, that you might find so repugnant that you could not listen as a fair and impartial juror to determine whether the defendant is guilty or not guilty of that particular type of offense?

A I don't think so, no.

Q Now, as you have also been told, the burden of proof is on the State. We don't have to do anything. As Mr. Graham sits here with me, he is presumed to be innocent until proven guilty beyond a reasonable doubt. Is there anything that would make you, at this point, not be able to give him that presumption?

A No.

Q Is there any reason you might think that he must have done something or he would not be here, the [p. 58] State of Texas with all its resources, would not have brought him to trial if they were not sure he had done something?

A What was the first part of that question?

Q Is there any reason for you to think that he wouldn't be here if he had not done something, he must be guilty of doing something, or the State wouldn't be –

A No, I do not believe that.

Q Ma'am?

A I do not believe that because he is here that he has committed a crime.

Q We have also told you that because of the State's burden and along with the order of the trial when the State rests, we can rest. We don't have to do anything. We can sit here and listen to the testimony and when they stop, we stop. It's all over. That is all you have to consider. And you have also been instructed that you cannot hold it as a circumstance against the defendant. Do you have any problem with that?

A You are saying if the defendant, himself, does not testify?

Q Yes, Ma'am.

A No.

[p. 59] Q You don't have any problem with going to the jury room and not even mentioning it, alluding to it or even holding it as a circumstance against him, whether there would be a question as to why didn't he tell us his side of the story if he wasn't guilty, if he hadn't done anything, why can't he tell us he didn't do anything? Do you understand the question?

A Yes, I understand.

Q Could you go back in the jury room without going through those gyrations and not holding it as a circumstance against the defendant that he did not testify against himself, testify at all?

A I thing I can. You want a definite yes or no, I suppose?

Q Yes, Ma'am.

A I would say that I would not hold it against him. I would not hold it against him.

Q Now, earlier, when you were talking, you indicated something to the effect that if he did not testify you would have nothing from which to base an opinion. Could you explain to me, Ma'am what you meant by that, please?

A No.

Q If you can remember?

[p. 60] A This is in the second phase, after the guilt, if guilt has been decided.

Q That is for you to answer. I was just listening to your exchange with Mr. Hobbs. You indicated that it could be that part?

A The part that I was trying to discuss if after guilt has been established and you get to the punishment phase, if there is no desirable facts or evidence brought up as to prior history, I think I would have a difficult time with sentencing death.

Q Okay, now, do you also understand, Ma'am, that as a juror that has been chosen to serve on this case, that you would not assess the death penalty?

A What now?

Q You would not, your own self, assess the death penalty. Your job as a juror would be to answer special issues that would be presented to you by the Court. If all of you unanimously answered all of the special issues yes, that would be special issue number one, number two and if raised by the evidence, number three, that the Court would automatically be mandated by its office to assess punishment at death. That you would not, on your own, be assessing the death [p. 61] penalty. You would just be answering special issues based on the evidence raised within the Courtroom?

A I understand that now.

Q Okay, now, you indicated – well, let me move on and I will get back to that. One other thing, we are also

here talking about punishment. So the first part of the trial as you have been told, is the guilt or innocence stage. The second part, if we get there, is the punishment stage. Now, unlike most criminal trials in the State of Texas were a defendant can choose who he wants to assess punishment if he is found guilty, because of the nature of the charge of capital murder, the code of criminal procedure mandates that the jury in this case assess his punishment. So we are not hopefully getting ahead of ourselves, as far as we are concerned in talking about punishment. Toward that end, would you have any feeling, Ma'am, that because we are talking about punishment at this stage, because we are mandated to do so by the code of criminal procedure, because we are mandated to talk about it now, we must discuss it with you now, have you any feelings in your mind that he [p. 62] must be guilty or we would not be looking ahead to talk about punishment, because we are mandated to?

A No.

Q Now, if we get that far on punishment, we will be talking about the special issues. If raised by the evidence the third special issue. The first issue determines whether or not the conduct of the defendant that caused the death was committed deliberately. The word deliberately to me has special definitions. How do you, Ma'am, in your own mind, define the word, deliberately?

A Intentional.

Q Do you have any problems with differentiating between the word deliberate, and as opposed to – I'm sorry, strike that. Do you have any problems with the word deliberately and deliberate as being one of a

thought out process where you sit down and determine that the result of your act will be to kill somebody?

A I use the word premeditated to that.

Q So you have no problems between the word premeditated and deliberate?

A No, I don't.

[p. 63] Q And you don't see them as synonymous?

A No, I don't.

Q Okay. You discussed deliberately previously when you were talking about Mr. Hobbs' example where he came around the corner and dropped the gun and it discharged, thereby killing the Court Reporter. He also gave you another example of coming around and walking up to her and shooting her. Then you said you could differentiate between the deliberate or intentional act of killing her and the other act, which may seem accidental in nature or something, and you also said you could understand it being deliberate being somewhere in between. Do you remember that?

A Yes.

Q What do you mean by being somewhere in between, and you can give us an example, if you would like, because none of us are talking about the facts of this case. We are talking about – unless you are chosen as a juror, we wouldn't know any of the facts of the case. The things we are talking about are circumstances that might happen. Hypotheticals. You can feel free to give me one, too. That is what this is called, and that is why we have an exchange and this is [p. 64] the only time we will get

to talk back and forth, and I will probably ask questions that will have you talking with me.

A The first question, the first thought that comes to my mind about deliberately, if a person is carrying a gun, is he intending on using it or what is the purpose of carrying it. Just because he has a gun in his pocket, does not mean to me that he is premeditating an act. If the one case where he had the gun and came to the corner and to me, that was accidental. He may have had it out for some other purposes, but the actual killing of this person was accidental, even if he had wanted to be intentionally shooting someone or going to shoot someone else. Could you lead me to the rest of it now at that point in time clear?

Q You indicated that somewhere in between you might still find the crime to be deliberate, somewhere between the accident and the intentional you still might find it to be deliberate, and I'm trying to find where that point is, if you have not – I'm not trying to elicit something that you don't know. If you have established in your mind somewhere where that point might be [p. 65] it's all right.

A Offhand, I cannot think of an example to back that up. I think generally that I'm sure there is an in between ground somewhere and depending on the evidence, I would have to decide at that point.

Q You would wait until you heard the evidence before you made that decision?

A I think the evidence would prove to me what that decision would be.

Q Fine. That is all we would ask. Also, in these cases, the State is not required to show you any type of motive or why the killing took place. Would you automatically assume that the killing was deliberate if he didn't know why it happened?

MR. HOBBS: Objection, Your Honor. It calls for a conclusion on the part of the witness that the State must prove motive and I object to that.

MR. MOCK: That was not my statement. I said the State does not have to prove motive. They only have to show the elements of the offense as outlined here, but my question was if they did not prove motive, which goes to punishment and punishment alone, whether or not she would [p. 66] be able to automatically answer yes to the question of deliberate because she didn't know why.

THE COURT: If you understand that question, Ma'am, you can answer it. I don't understand the objection nor the statement.

A I'm having trouble understanding the statement. I don't have to give a yes or no to that.

Q (By Mr. Mock) No, you don't.

A I don't understand the question.

THE COURT: Well –

Q Well, do you understand that the State doesn't have to show you why a person was killed, do you understand that?

A Yes.

Q Okay, they only have to prove to you the eight elements Mr. Hobbs placed on the board and indicated to you that that was the elements of the offense. They have to prove each and every one of those, each and every one singularly. They can't prove the four out of seven or five out of eight and you give them credit for the rest of that. Do you understand that?

A Yes, I do.

Q Part of that is and a lot of it comes from [p. 67] television or t.v., I imagine, but there is an underlying factor that there is also a motive for something being done. Somebody always wants to know a motive, there is a reason for something being done. Do you understand that they don't have to show you a reason or a motive for any – for the killing, itself? They don't have to show you why it was done?

A Okay.

Q Do you understand that?

A I accept that.

Q Yes, Ma'am?

A Yes.

Q And you can still, return a verdict of guilty if you so believed by the evidence that each and every element of the offense without being shown why you think it was done?

A Yes.

Q You still could return a verdict of guilt?

A Yes.

Q The point I am alluding to is once we get to – if we get to the punishment phase of the trial, would the fact that you didn't know why it happened, you determined that it happened, that it was done by some certain person, would the fact [p. 68] that you might not at that stage of the trial know why it happened, effect your deliberations in answering the questions?

MR. HOBBS: objection, Your Honor. That once again, implies that the State must prove motive in the punishment stage, although Counsel's question precludes that during the guilt stage, and I object on those grounds.

THE COURT: That is overruled. Let me see if I can explain this a little bit.

A All right.

THE COURT: The State doesn't have to prove to you why a crime is done. Obviously, there are some killings that take place with no motive whatsoever, just someone bent on doing a crime of violence. Mr. Mock is asking you if the State does not prove to you what the motive is would that in any way affect your deliberations on the punishment phase of the trial when you are trying to determine if the act was committed deliberately, and once again, if you can't answer the question, say, "I can't answer the question," and I think that is what Mr. Mock is driving at.

[p. 69] QUESTIONS CONTINUING BY MR. MOCK:

Q I'm not trying to confuse you.

A You understand this is my first time being questioned like this at all?

Q Yes, Ma'am.

A A lot of these questions I have never considered at all. The way I understand the question you are asking is that in the punishment phase if we get that far and motive has not been brought up or first established at the first phase of it, would that affect my deliberations in phase two?

Q Yes.

A I would answer that no, it would not affect me.

Q That is basically all I was asking. Thank you. As to special issue number two, I would like to ask you if you were chosen as a juror to hear this case, what kind of information would you like to have brought to you to assist you in determining the answer to special issue number two?

A Prior history.

Q Well, could you be a little more specific as to what do you mean by prior history?

A If there are any other criminal acts.

[p. 70] Q Now, the Court and the Prosecutor have also told you that they can bring you evidence of prior criminal acts. They can also bring you acts of violence at or near the time of this criminal offense, and then the other, reputation testimony, about the defendant from the community in which he resides, toward that evidence. Is there anything special that would assist you, not necessarily that you require us to bring, that would assist you

in making up your mind as to whether the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

A In my opinion, what you talk about the probability that a continuing threat, in my opinion, a first offense of guilt does not make me believe that it always happens or that it would happen again. What I'm trying to say is that I, in my dealing with other people as a supervisor, have always given the person more than one chance to make a mistake, but if it is repeated, action is required.

Q That is fair. Would the fact, would the fact that a person has committed another criminal act of violence automatically make you vote yes to [p. 71] issue number two?

A Not automatically, but it would be a consideration.

Q Well, assuming that it has been shown that the person has committed other criminal acts of violence, what else would you like to have to assist you in making the determination as to issue number two?

A Other instances, what he has done for the community could be brought up, but a person, in my opinion, a person's beliefs, that he is emotionally convicted to his outwardly expressions in his actions, so even though a religious background was brought up, if that person is still committing acts of crime, then I feel like he would not be serious about his other emotional convictions. Does that answer your question?

Q Very well. Thank you. Moving on to question number three, and this is the one we are going to probably spend the most time on because it raises some issues that for me, as a defense lawyer, who does this everyday, to understand. Okay?

A Okay.

Q And that is if raised by the evidence whether the conduct of the defendant in killing the deceased [p. 72] was unreasonable in response to the provocation, if any, by the deceased. Now, what this may seem to you is a civil defense issue, that because the deceased acted in a certain way, thereby, provoking the person to kill him, that what the person did may have been to protect himself or may have been in self-defense. Do you understand, Ma'am, that in a capital murder where you are alleging another criminal offense that the issue of self-defense is not available to a defendant?

A I had not heard that.

Q Well, it is not available to a defendant.

A Okay.

Q So, what we are talking about here is not saying that I acted in self-defense or acted to protect myself, which in cases of murder or some other offenses charged, do you understand our penal statute is justification for the act of one, is not available in this instance to the defendant or any defendant charged with capital murder. What we are talking about here, however, is some act done by the deceased and the deceased person, which causes the defendant to act in one way in response to that provocation, the end [p. 73] result being the death of the

deceased. Are you with me, because I might have lost myself? I was trying to think and talk.

A I'm following your thought. Is there a question behind this or is this a statement?

Q I'm going – I'm heading you to where I'm going to ask you a question, but I want to make sure you have an understanding of the basic law as it relates to the third issue.

A As I understand it, you are saying that if in the process of the crime the deceased person provocated the defendant some way which caused him to shoot.

Q To react, and that reaction thereby is the cause of the death of the deceased.

A Okay.

Q Let me give you a couple of examples maybe that will clear up something. Can you understand the situation where a person goes into a, somewhere where he has no place to be, with a gun, walking up to a person and saying, "I want your money," and then shooting him straight away? Another instance might be where you walk into somewhere where you have a perfect right to be and it's at or around the time where there are other [p. 74] people who could be there. The person walks in with a gun and says, "Give me your money." Well, in response to that question of giving me your money, looking down the barrel of a gun, the deceased person then makes a move for his own gun and raises his gun in an attempt to fire at the robber. The robber is then shot and killed. Can you differentiate between the two examples that I gave you?

A You said the robber is shot and killed.

Q No, I'm sorry. The person that was at his place of business was then killed because he pulled a gun as the robber was asking him for the money.

A Yes, I see the difference.

Q You can see the difference between the two?

A Yes.

Q What does provocation mean to you?

A Causing a person to react.

Q And what might it mean to you in the context of this special issue number three that you may have to answer?

A What was the question again?

Q What does provocation mean to you within the context of issue number three and the way it is construed?

[p. 75] A The way I'm interpreting this, the first thing I think of is when the deceased, if the deceased was trying to protect himself or angry words or exclaiming of some sort.

Q Well?

A I'm blind right now.

Q I can understand that. Feel free to tell us.

A I'm blind right now.

Q This is a matter of exchange for us to chat and see how you feel about certain things. That is all. It doesn't

have to square off with either one of us. It's a matter of how you feel. That is what is important. Let me ask you thin, Ma'am. Have you developed in your mind any concrete feelings about the death penalty in this assessment in our society?

A I personally do not like the idea of making a decision to send someone for the death sentence. The recourse I do have now this is because of my own Christian convictions, I would not like the idea of thinking well everything at that point, it would be beyond a doubt that he would be guilty because of connecting evidence any wrong decision, a wrong decision could possibly be made somewhere. Twelve people are only human. [p. 76] Knowing that if a guilty sentence is issued and the death sentence is also decided upon that in my mind, I think that the case would be referred to a higher Court. I may be wrong, but that would ease my conscience that I have killed someone myself by making a decision.

Q. Well, have you had the feelings about the death penalty for a long time or have they been recently formed or have you even considered it?

A When I was in college I wrote a term paper on capital punishment, but I don't remember that much about it anymore. Up until today when I was told I had to make a decision, I had not made a decision which way I would go. The only thing that has happened me making a decision is speaking before today, long before I knew that I was going to have jury duty, speaking with the person that was on a capital murder case that I know I didn't understand how she could do it and she said once you get the evidence and you are sure there is no problem in

her own mind of making her mind, of the punishment phase.

Q One way or the other?

A Yes.

Q You talked to somebody else and got their feelings, [p. 77] but could you voice your own emotions, because you know that although you are not sentencing a person to death, you know that it is mandatory by the code of criminal procedure, but the end result is going to be the same. Could you divorce your emotions and vote according to the evidence, knowing that, knowing what the end result of your verdict would be if you answered yes to all three special issues?

A I cannot answer that with a strict yes or no.

Q I would like for you to explain, Ma'am.

A I would have to say I think I could. I would only know my emotional reaction after I had done that. Just make that decision. I do not know how I would act after I made that decision, but I feel as though the evidence, if the evidence is that clear to me that it is guilty, then I should not have a doubt in my mind about it.

Q One minute, please. Does the fact that you would not be the person assessing punishment at death if you came to that conclusion, but that it would be because it is mandated by the code of criminal procedure, the Court would have to do it, would that in any way ease your apprehension about the assessment of the death penalty?

[p. 78] A And may I add one comment?

Q Yes, Ma'am.

A The only other thing that would help me assess the death penalty is when I was talking about needing extra evidence or facts about prior history. If there was – where multiple offenses were, I would not want to live in the community with that person, and I would have to take some action to protect myself.

Q Well, Ma'am, in assessing any type of punishment in these types of cases, it takes twelve unanimous jurors to answer yes to special issue number one, two, and if it's raised by the evidence, number three, in order for a death penalty to be assessed. It takes a number of ten jurors voting in one way, voting no in order for the life penalty to be assessed. If you had heard the evidence and made a decision in your own mind, based on the evidence that you heard, could you hold out, Ma'am, for what you believed, with the resources and full deliberations which is within the province of the jury, but through other than through that deliberation process, could you, after you made up your mind, hold out for what you believed in [p. 79] against twelve people or eleven people that might not be for what you believe, one way or the other, after you made the decision, could you stick with your decision?

A Yes, I can.

Q And one kind of last question, Ma'am. Was – are you of the frame of mind now that if you were on trial for capital murder that you would like to have a person of your own convictions at this point to sit on your jury?

A Yes, I would.

THE COURT: Anything further, Mr. Mock?

MR. MOCK: Just one minute, Your Honor. Just one more question, Your Honor.

Q Ms. Altman, is there any reason whatsoever, and again, like we told you there are no right or wrong answers, this is the only time we will have a chance to talk to you, is there any reason whatsoever that you can think of in your own mind or your own conscience that you could not be a fair and impartial juror, listen to the facts of this case and make your decision after the evidence is in, one way or the other, any reason whatsoever that you can think of that I might not have touched upon, now will be the only [p. 80] time you will have a chance to tell us if there is?

A Being that I have never been in a legal atmosphere before, the only thing I have seen is what is on t. v. and I know that is very different, but knowing that even like on t. v. things I have been able to make a decision on that, I would hope the evidence in whatever case if I ever get picked would be relatively clear to me where there wouldn't be many tough decisions to make. I would hope the evidence would be quite clear.

Q Yes Ma'am, but can you think of any reason you can think of in your own mind that you could not be fair and impartial?

A I don't think there is.

Q Where you couldn't listen to the facts?

A I know of no reason why I couldn't listen.

THE COURT: What says the State?

MR. HOBBS: The State would accept.

MR. MOCK: You can give her a date to come back, Judge.

THE COURT: Will you stand and be sworn by the Clerk of this Court?

(At this time juror sworn by the Clerk)

[p. 81] THE COURT: Ms. Altman, we anticipate it will take approximately two weeks to complete selection of the jury. We have your home phone number and your business phone number. If for any reason you should change either phone number or your place of work within the next two weeks, if you will contact the Bailiff or the Clerk in this Court and let us know of the change. Once we begin testimony, we expect one week for the trial. It should be completed in three weeks. You are excused at this time to go to your home or place of work or whatever, and we will be contacting you in advance to let you know when the trial is going to begin.

JUROR: Will someone give me a list of names or phone numbers or can I get that from someone?

THE COURT: I will ask Mr. Pollinger to give that to you. Thank you, Ms. Altman.

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[p. 281] MR. RAYBURN M. HOOVER, JR., called as a prospective juror, after having first been duly sworn, testified as follows:

EXAMINATION BY THE COURT

Q. Mr. Hoover, it's been a little over a day since we spoke to you yesterday. However, I want to review some of the things I spoke about yesterday to make sure that what I spoke about did not confuse you and you understood what we talked about, and then it will become necessary to cover some things that we didn't speak about yesterday.

You will recall from my speaking with you yesterday as a group that I discussed certain constitutional principles that apply to the trial of every criminal case. You recall I spoke about the fact that the defendant in every criminal case is presumed innocent until he is proven guilty. You further recall that I spoke with you about the fact that the State has the burden of proof in all criminal cases, and that is to prove every element of the offense alleged in the indictment beyond a reasonable doubt.

[p. 282] You further recall that I spoke with you about the fact that the mere fact that the defendant is present in the courtroom or that an indictment has been returned against him is no evidence of guilt whatsoever. That in applying the presumption of innocence, it stays with the defendant throughout the trial and that you should infer no inference of guilt by virtue of the fact that Mr. Graham is present in the courtroom, that any charge has been

filed against him. You should not have the attitude that he must have done something wrong or he wouldn't be here. Do you understand that, sir?

A. Yes, sir.

Q. We further spoke about the fact that any accused in a criminal case has the right to remain silent and that the jury cannot infer any guilt from the fact that the accused does not testify against himself and it goes one step beyond and says that is also applicable if the defense presents no testimony at all. If the defense chooses to rest behind the State, you should not have the mental attitude [p. 283] of saying you need to hear both sides of the story before you make a decision because that is the constitutional safeguard against the defendant having any burden to present any testimony at all. I take it you can follow that principle of law, sir?

A. Yes, sir.

Q. You also recall that I spoke with you about the order of trial in a criminal case in Texas being what we call a bifurcated trial system. We have the guilt or innocence phase of the trial and we have the punishment phase of the trial. I know from looking at your juror information form you stated that you served on a criminal jury in a burglary case in 1971. So you are familiar with the two-step trial system?

A. Yes, sir.

Q. Obviously, the reason for the individual questioning in this case is because the import of the situation as I talked about yesterday, and the fact that should you serve as a juror in this case and return a guilty verdict,

should you return a guilty verdict individually and collectively as a member of [p. 284] the jury, you would then have to reach a decision with regard to what punishment should be assessed in this case. As I told you yesterday, in a criminal case involving a capital murder situation, the jury only has two alternatives for punishment. Those alternatives are life in prison in the Texas Department of Corrections or death by lethal injection. Those are the only two alternatives that the Court has or that the jury has. I will also go on to say that I, as the Judge, will not hand a slip of paper to the twelve members of the jury and say, is your punishment life or death. That is not the way it is done.

In a capital murder case, the jury instructs the Court as to what punishment the Court is to assess by way of special issues. Those special issues are tacked to the board behind you. Special issues number one and two are in the punishment phase of every capital murder case that reaches the punishment stage of the trial. Special issue number three is appropriate only if it is raised by the evidence, but there will come a time should [p. 285] you serve as a juror in this case, in which you will have to answer individually and collectively as a jury special issue number one and special issue number two, and it is the way in which the jury answers those special issues that determines what the punishment should be. The first special issue really effectively causes you to reflect back on the testimony that you have heard in the guilt or innocence stage of the trial because you have to reflect upon the testimony that you heard dealing with the conduct of the defendant in which you have decided that he is guilty for causing the death of another person, you

have to decide whether the act he committed in causing the death of that person was committed deliberately and with reasonable expectation that the death of the person he killed would occur. Special issue number one, in my mind, there are two key phrases. The word deliberately and the phrase reasonable expectation of death incurring. The word deliberately, unlike certain words or phrases that will be defined in the Court's charge in [p. 286] the guilt or innocence phase of the trial, there will be no definition as to what deliberately means in the Court's charge. That is something you will have to use your own common sense and define. Some people consider deliberately to mean an intentional act or someone's conscious objective to do that act. Possibly a voluntary act on that person's part or a willful act. All of those are synonyms. It is how you personally define deliberately in your common sense deliberation. The second phrase, reasonable expectation that the death of the deceased would occur, in considering the defendant's conduct, do you, as a juror believe beyond a reasonable doubt that the defendant reasonably expected to cause that – he reasonably expected to cause the death of the deceased in the case. I think if I give you two examples, it might make this a little more clear. Consider a situation in which a person goes into a drugstore with a pistol and goes in to rob a store, walks up to a store clerk, takes the money from the store clerk. The clerk gives the robber the money. The clerk [p. 287] does nothing in any way to provoke any difficulty with the robber. The robber just takes two steps back and pulls the trigger and shoots and kills the clerk. Obviously, you would probably have not much difficulty in determining number one in killing the clerk, the robber

acted deliberately and number two, in shooting the clerk of the clerk would occur. You probably wouldn't have much difficulty in that situation. On the contrary, you might consider a consideration where the same robber goes into the store, fully intending to go to commit robbery, but to not kill anybody, and when he walked in the store he trips over a basket, falls and the gun slips out of his hand and the gun hits the floor and accidentally goes off and hits the clerk. You might have a different result when you determine whether or not in causing the death of the clerk it was done deliberately and that he reasonably expected that the clerk would be killed, that death would result. You see there are differing fact situations, but those are pertinent in [p. 288] regard to special issue number one. Special issue number two more or less calls upon the jury to be clairvoyant, to look into the crystal ball and in effect to predict the future, because in special issue number two, the jury has to make a decision whether or not there is a probability that the defendant will commit criminal acts of violence in the future that will constitute a continuing threat to society. Obviously there are many things that you can look at in reaching this decision. You can look at the act, itself, in this particular capital murder case. You can look at that fact situation and say it is such a heinous fact situation that just based on the mere facts alone, you would say that person would be a continuing threat to society. You may not. Obviously, there are other types of evidence that the State could present to you. The State could show you a past criminal record and show you the commission of other offenses that the defendant may have committed. It can

present reputation testimony by other person in the community saying the defendant was nct a [p. 289] peaceful and law abiding person. These are things you can consider. Obviously, we are looking for persons who can go not only into the guilt or innocence phase but in the punishment phase of the trial with an open mind and to not be predisposed as to how they are going to vote one way or the other, and to only vote their conscience after the evidence is completely presented. The State has the same burden of proof on the punishment phase of the trial that it does on the guilt or innocence phase of the trial. The State must prove to you beyond a reasonable doubt, beyond a doubt based on reason, that the answers to special issues number one and two should be yes. If the jury unanimously returns a yes answer to each special issue number one and number two, I, as the presiding Judge, in this particular case, or any presiding Judge in any capital murder case has no discretion but to assess punishment at death. I do not have the power or the authority to change the jury's verdict. If the jury answers both questions yes, I cannot say in spite of your verdict I assess punishment [p. 290] at life. On the contrary, if the jury returns a no answer, one or two no answers, I do not have the authority to say I think that the man or woman should get the death penalty and assess the death penalty. The jury, their verdict is not done in a shroud of secrecy. The jury, by its verdict or by its answers to the special issues will know in advance the full import of their answers because I have no authority to change it. Two yes answers mean the death penalty. One no and one yes or two noes mean life in the Texas Department of Corrections. A yes answer requires a unanimous verdict

by all members of the jury. No answers require ten or more and no answers does not require a unanimous verdict. Ten or more is required for a verdict. Do you have any questions?

A. No, sir.

Q. It is obvious that the most pertinent point we are dealing with, the most important thing we can talk to you about is your feelings in regard to the death penalty. Our law requires that I ask you specifically or in a certain format your feelings about the death penalty, [p. 291] and I can vary somewhat in my discussions. My initial question to you is: Do you have a conscientious, religious or moral scruple against the imposition of the death penalty as punishment in a case that you consider for it to be proper?

A. No, sir.

Q. I take it, then, you are telling me that in a situation where you had found a defendant guilty by evidence beyond a reasonable doubt and in the punishment phase of the trial you were presented evidence that convinced you that the answers to special issue number one and two should be yes, that knowing full well what the impact of your answers are, you would still answer those questions yes?

A. Yes, sir.

Q. You have no religious, conscientious or moral scruples against the imposition of the death penalty in a proper case?

A. No, sir.

Q. Okay, now, as I have stated, in every capital murder case, a jury will be faced, on the punishment phase of the trial, if they get to it and only if they get to it with deliberations [p. 292] on special issues one and two, and you can see there is a third special issue tacked to the board, and as stated by the first phrase if raised by the evidence, sometimes special issue number three is submitted. Sometimes it is not. It is only submitted if it is raised by the evidence. And it goes on to say whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased. And that requires a little explanation. Obviously, what we are dealing with here is a capital murder case. We are dealing with the situation where an accused in a capital murder case has provoked the difficulty. He has started the confrontation by, for instance, in the example that I gave you, that the robber, walking into the drug store with a gun, walking in with a gun, that person has provoked the difficulty. If the store clerk were to pull a pistol from under the counter and fire at the robber, the robber cannot, in turn, claim self defense and say he – his life was in jeopardy, and he had to kill the store clerk. Special issue number [p. 293] three is more in line of mitigation and not in the line of self defense, but what the import of special issue number three is presented is whether the conduct of the person who was killed in any way provoked or created more provocation in a situation in that the defendant, in shooting the deceased, embarked upon something, in shooting the deceased, was his conduct reasonable or unreasonable, based on the provocation that that store clerk had added to the situation. I realize it is a very fine line, and it may be difficult to

understand, but let me see if I can give a couple of more examples. You may view differently when you are faced with the situation of assessing life in the penitentiary or death by lethal injection. The situation where the robber walks into the store, takes the money from a store clerk, and as he turns to leave, not intending to hurt anyone, the store clerk fires and shoots him in the arm or leg, and he turns and shoots and kills him, you may view that situation differently than you would a cold blooded killing where the store clerk is helpless with nothing in his [p. 294] hand and the robber kills him out of spite. You may view those situations differently. That is not to say our law excuses or in any way allows that in mitigation with regard to the fact that he is guilty or not guilty of capital murder. The – it only is added for the jury's consideration as to whether or not they will assess punishment at life or death. So, if the jury finds that the conduct of the defendant, in killing the dead person, was unreasonable in response to any provocation by the deceased, if he provoked the situation at all.

Going back to the situation where the man is standing there with nothing in his hand and he is killed, obviously, there is no provocation. Therefore you would probably find that the defendant's conduct was unreasonable and you would answer special issue number three yes. On the other hand, you might find that it was not unreasonable where he had been shot twice by the store clerk and was trying to get out of the store. You may or may not. That is in your discretion as a juror. Do you see what I am driving at, [p. 295] sir?

A. I think I do.

Q. So what you are looking at is whether or not the store clerk or whatever example we want to use in any way added to or provoked the difficulty that resulted in his death. And if you find that the killing of the deceased was unreasonable in light of any provocation, if there was any, then you will answer special issue number three yes. If you find that the killing was not unreasonable because of the provocation by the store clerk, then you would answer that no. Okay, special issue number three with regard to its answer has the same impact as either of the first two. If you answer special issue number three no by a ten to two vote, I have no discretion but to assess punishment at life as opposed to death. In that case, if there were two yes and one no answers, it still would result in life imprisonment in the Texas Department of Corrections. If there are three yes answers, once again, the punishment is assessed at death by lethal injection. Do you have any questions with regard to the instructions or [p. 296] the explanations I have given you with regard to those special issues?

A No, sir. I don't think so.

Q Is there anything we have talked about up to this time, Mr. Hoover, that presents any problem to you?

A No, sir.

THE COURT: Mr. Hobbs, do you have any questions?

EXAMINATION BY THE STATE

QUESTIONS BY MR. HOBBS:

Q Yes, Your Honor. Good afternoon, Mr. Hoover. My name is Carl Hobbs, and I am an Assistant District Attorney assigned to prosecute in this case. As the Judge told you, we are looking at capital murder in this case. The Judge has pretty well gone over a large part of this, but the first part I am going to be talking to you about is the first phase of the trial. The guilt or innocence phase of the trial, when the jury must decide whether or not the defendant is guilty of the offense with which he is charged. The rights which are accorded to the defendant is explained to [p. 297] you by the Judge apply both – equally in both phases of the trial. The burden of proof is upon the State to prove the case beyond a reasonable doubt. Now beyond a reasonable doubt, I think is not beyond all doubt or beyond a shadow of a doubt because if it was beyond all doubt you would have to have been there and actually seen what happened, and if that fact were the case, you would be a witness and not a juror. Do you have any problem with that, sir?

A No, sir.

Q Okay, now, the burden of proof in proving beyond a reasonable doubt does not – the law does not require the State to prove a motive, why the defendant did what he did. It is sufficient that we show the actions of what happened. You have a problem with that, sir?

A No sir, I think I understand.

Q Now, your job as a juror, should you sit as one of the twelve will be – is to judge the facts. The jury hears

the facts and establishes what the facts were, to judge the credibility of the witnesses and that means how much, if any, of the testimony of a given [p. 298] witness you choose to believe. You can believe all of it, part of it or none of it, and to resolve conflict. Conflict, in and of itself, I make the statement is not reasonable doubt. As an example, say that I go, I am going to be the defendant. I go into a convenience store where the clerk, Ms. Hamilton, is behind the cash register, and the court reporter is also present in the store. Okay, I go in and rob them, and then I come and I'm caught, say later on. During my trial they describe me as being the person, and identify me as being the person that committed the offense. Ms. Hamilton said I had tan pants on and the court reporter said I had dark blue pants on. Okay, that is conflict. But both of them said I was the robber. It is irrelevant and immaterial as to what color pants I had on. It is whether or not I committed the offense. Do you have problems with that?

A I follow what you are saying.

Q Okay, now, also what must the State prove beyond a reasonable doubt? It is the elements of the offense and in this case, it is the [p. 299] elements set out in the indictment: That it was Gary Graham, that he committed the offense; that it was in Harris County; that it was on or about May 13th, 1981; and that the defendant, Gary Graham, did, while in the course of committing or attempting to commit either, either one, the robbery of Bobby Grant Lambert, intentionally caused the death of Bobby Grant Lambert by shooting Bobby Grant Lambert with a gun. That is what the State must prove to you beyond a reasonable doubt. That and only that. Do you have any problems with that?

A The question you are saying whether the robbery actually took place or not or the attempt, either one, right?

Q Yes, sir. Because robbery is defined in our law, capital murder is the commission of a felony along with the death of an individual. We are talking about the commission of robbery or aggravated robbery accompanied by the death of the individual. Now, robbery is defined in our code as being a person commits an offense of robbery if, in the course of committing theft as defined in the code and with intent [p. 300] to obtain and maintain control of the property, intentionally and knowingly or recklessly causes bodily injury or fear of bodily injury and death by using and exhibiting a deadly weapon, okay?

A Yes.

Q Now, in the course of committing theft is defined here on the board, sir. That means conduct that occurs in an attempt to commit it, during the commission of or immediate flight afterwards. Okay?

A Okay.

Q So, in essence, you can have the offense of robbery, it can be committed by the mere speaking of words and getting no property. In essence, let me give you an example. If I came up and went up to Ms. Hamilton and in the, say in the convenience store and I pull a pistol on her and demand the money from the cash register and a police officer walks up behind me and sticks a gun in my back and says drop it, I fully have committed the offense of aggravated robbery, okay?

A Okay.

Q Any problem?

[p. 301] A No, sir.

Q Okay, so what I am saying is in the attempt to commit the robbery where he doesn't have to get property, just so you believe the robbery is occurring or that the robbery actually occurred, either way?

A Yes.

Q Now, let me give you another scenario. You understand the law, if you believe beyond a reasonable doubt the testimony of a witness, the law says of a single witness in a given case, if all the elements necessary in the indictment have been proved beyond a reasonable doubt through a single witness, the law says that is sufficient if you believe that beyond a reasonable doubt. As an example of a single witness. It is sufficient for a finding of guilt for that offense, okay?

A Okay.

Q Do you have a problem with that?

A No, sir.

Q Okay, as an example, let's say Mr. Mock and his cocounsel there, Mr. Thornton, Ms. Hamilton and the court reporter are all inside this room here, this courtroom by themselves. [p. 302] I walk in through the door. I come up to Ms. Hamilton and I stop and demand her purse. Okay, the court reporter is over on the side where you are now, and it is a little difficult for her to see where I am at, standing in front of Ms. Hamilton over here on

this other side. Mr. Mock sees me, sees that I have a gun and he ducks down. Mr. Thornton sees me and gets back here, but he takes a good look at me. I shoot and kill Ms. Hamilton in the process of taking her purse. I get away. I am caught later on, and now I am coming to trial. Although there were several people in here, the court reporter was unable to see me. Mr. Mock was hiding from the gun, and he saw a general description, but he can't identify me. Mr. Thornton says Carl Hobbs is the one that killed her, and I saw him. If you believe beyond a reasonable doubt that the State has proved each and every element, along with the testimony of Mr. Thornton as to my identification, and I was charged with capital murder, which in the scenario I gave you, could you, if you believe Mr. Thornton's testimony that I was the robber [p. 303] beyond a reasonable doubt, base a conviction for capital murder?

A If I believed that was what the eye witness saw, I think so.

Q That is what I am asking. If you believe that testimony beyond a reasonable doubt?

A Yes, sir.

Q And, just because it was a single witness, it wouldn't bother you?

A I could hope it wouldn't bother me, but if the witness was convincing enough and the other witnesses weren't or they couldn't elaborate, I think I could go with the one witness.

Q Okay, sir. One of the factors we are going to consider is under our law, a person, when he reaches the

age of 17 is an adult in our State. The fact that an individual is young, say 17, 18, 19 years old, in your mind would the same fact situation be different for a 17 or 18 year old than a 35 or 36 year old man, say the same offense, just two different people, one is 35 and one is 17. The law says they should be treated equally. Will it cause a problem for you?

[p. 304] A No, sir. I think you would have to go with the same treatment for everybody.

Q Okay, sir, now, you realize it is one of the defendant's rights, he doesn't have to testify, and if he doesn't testify, you can't hold that against him. You have to look to the State to prove the elements of the offense beyond a reasonable doubt. One of those rights also is the State can't call him as a witness. Okay?

A Okay.

Q And the defendant doesn't have to – they can sit there and do nothing if they want to. That is their right?

A Yes.

A Now, upon a finding of guilt, we move into the second stage of the trial. The Judge has talked to you in reference to the special issues. Now, referring to special issue number one, whether or not the conduct of the defendant that caused the death, that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result. Okay. Deliberately [p. 305] does not mean premeditation. Would you agree with that?

A In reading the way it is written up there, I would agree that deliberately would not mean premeditation.

Q Well, Webster's Dictionary describes it as willful or voluntary. Could you accept that?

A Yes.

Q Now, it won't be defined by the Court in it's charge, as many other words will be, that are words of art and have special meanings. This is just good common sense. But you would agree with me that it doesn't mean accidentally?

A Right.

Q Now, you wouldn't have any problems referring to the evidence that was heard in the first phase of the trial, in the guilt stage of the trial in determining your answers to that. In fact, you would have to refer to it, wouldn't you?

A Yes, it would be kind of hard to come to any conclusion without a back check.

Q And based upon that, that testimony alone, you could make a decision whether or not special issue number one –

[p. 306] MR. MOCK: I am going to object to him leading. This is voir dire. It is not his witness.

THE COURT: Make it in question form.

Q As to special issue number one with the benefit of the previous testimony in the guilt stage, would you be able to answer issue number one?

A Yes, sir.

Q Okay, now, in the second stage of the trial, it is a separate state. The testimony from the first stage can be

reoffered, but also in this second stage, the testimony that the jury will be allowed to have is testimony that the Court determines relevant to the issue, okay?

A Okay.

Q That can be prior record, if any, other acts of criminal violence, if any, reputation witnesses, if any, to help in making your decisions, particularly as to special issue number two, okay?

A Okay.

Q Now, as to special issue number one, and before I go into that, now, the Judge has gone over quite a bit with reasonable expectation. Do you have any problems with that, sir?

[p. 307] A No sir, I don't think so.

Q Now, as to special issue number two we are talking about probability, some occasion of what the conduct of the defendant might likely be. Now, probability, is not going to be defined. As such, would you agree that it's likely or more than likely probable? How would you define probability in that context, sir?

A Based on what I heard, it would be whether in my mind the defendant would or would not be likely to do this type of thing in the future.

Q Okay, so it's not something that is something that you have to be absolutely certain of. It's something if you are fairly certain that it will occur that it's likely to occur, based upon the evidence, and once again, the State's burden is the same. It's the State's burden to prove to you

beyond a reasonable doubt the answer to special issue number one, two and three, if it is submitted is yes.

A I sure would like to see all the evidence I could.

Q Now, in speaking as to special issue number two and answering that question as to the probability [p. 308] would you agree with me that in a given capital murder, and we are going to be talking about murder in the course of committing robbery, that the particular details of the crime, itself, would aid you in some manner in determining and answering that question as to the probability of the defendant of committing future acts of violence, how did he act in this given situation?

A Would you run this by me again? I kind of got lost on that.

Q Now, would you agree with me, sir, that in answering this question as to the probability of future acts of violence, that the acts, the details of the offense which the defendant had been convicted – has been convicted of in the case, in the case, itself, those actions, what did he do, how did he do it, when did he do it, what were the circumstances, aid you at least partially in answering this question?

A Yes.

Q How did he act this given situation?

A Yes.

Q It give you a point of reference.

A Well, I would have to have heard it already, so I think obviously, I would have to say that that [p. 309] would weigh on whatever decision I came up with.

Q And then everything, other evidence, if any, you would consider to help you?

A Whether or not that probability exists? Yes, sir.

Q And special issue number three may or may not be submitted, depending on the evidence and the Court has gone over that with you, and you don't have any problems with that?

A I think I understand that one.

Q Now, as to answering special issue number one and two, you have no conscientious or moral objections or religious grounds for opposing the death penalty, do you, sir?

A No, sir.

Q And then, in a proper case, now criminal acts of violence, now that can be as little as an assault can be a criminal act of violence. If I slap Mr. Mock, that is a criminal act of violence and if I walk out and slash your tires on your car, that is a criminal act of violence, as well as shooting at somebody. Aggravated assault, robbery, aggravated robbery or murder. Sir, do you believe that capital punishment in referring as to special issue number two, in [p. 310] particular, that those criminal acts of violence would have to constitute something no less than murder, or would other criminal acts of violence be in your mind sufficient to show you to answer that question as to probability of the defendant's future conduct, as little as criminal mischief, sir?

A Well, I don't know what criminal mischief is, but like I say, when in my own view of it, when you get into a situation like this, you have to look at everything that has

been said and it all fits into what I personally think that the defendant would or would not do. I'm not knowing if I'm answering exactly.

Q You would want to look at his conduct, not only in the given instance, but whatever evidence might be there in an instance, you are telling me that you are going to go into the penalty stage with an open mind, and you are going to look at all of the evidence presented, and the Defense doesn't have to present any, but they can if they so desire to reputation that a given situation as in a hypothetical situation, we can't talk about the facts of this case, say for instance the defendant brought in fifty or [p. 311] sixty witnesses that said he was an exemplary person, he led an exemplary life and this was the first time something had happened. You'd take that into consideration, wouldn't you?

A Yes, I think you're talking about a capital offense here, possibly you know the death penalty and I think you have to weight anything that is brought into it very carefully, no matter what it is.

Q And are you telling me, sir, that if you are shown that evidence where you are convinced beyond a reasonable doubt that the evidence to those special issues should be answered yes, would you have any hesitation if you had – if it had been proven to you beyond a reasonable doubt, to answer yes, knowing that yes answers would cause the court to have to impose the death penalty?

A If you can convince me beyond a reasonable doubt in my mind, yes sir, I could.

Q Just as a point that wouldn't be an impossible burden, impossible burden upon the State in looking at it, my question is this: from your viewpoint, the State's burden, as the Court has talked about it and as I have talked about it [p. 312] is beyond a reasonable doubt. In your mind that is not defined. I have told you what I thought it was.

A Right.

Q Okay, to achieve that level of beyond a reasonable doubt, you are saying that it is an achievable level, it is not something that is impossible for the State to do from your standpoint?

A No, sir. I think if you presented enough evidence to convince me and here again, I, right now, I don't know what it would take or not take to do it. It would be very hard for me to convict, but at the same time, I think that if you were able to convince me of this person's guilt on the matter, I could, you know, vote guilty on it, or answer the question yes, but like here, again, I say, it would take a lot more from the Prosecution to do it, but I could give you the yes on all three issues if it came down to that.

Q Okay, now, the burglary that occurred that you served on, the criminal jury on, was the jury able to reach a decision? I don't want to know what you decided, but did the jury reach a [p. 313] decision?

A No sir, the jury did not reach a decision.

Q Did that experience in any way cause you to have problems with sitting on a case such as this, sir?

A No sir, I don't think so.

Q Were you in Vietnam?

A No, I wasn't.

Q The experience, the bad experience you had with the officer in giving you the ticket, would that in any way affect your ability to judge fairly and impartially the testimony of police officers?

A No, sir.

Q Do you have any questions of me, sir, on anything we have talked about or something that is not clear to you?

A No sir, I think I understand, you know, why the stuff as it is written up there. I understand.

MR. HOBBS: The State will pass the witness.

THE COURT: Mr. Mock, before you begin, Mr. Hoover, let me ask you one other question. We anticipate it will take approximately two weeks to complete jury selection in this case. [p. 314] We anticipate that approximately the 26th we will begin testimony hopefully, and that I do not anticipate it to take more than a week to try the case. Would that in any way create a hardship for you?

A We had a vacation scheduled for that week, but I can postpone it.

THE COURT: Can you reschedule it?

A Yes.

THE COURT: You may proceed, Mr. Mock.

EXAMINATION BY THE DEFENSE

QUESTIONS BY MR. MOCK:

Q If it please the Court. My name is Ron Mock. I am sitting by Chester Thornton seated to my left. First of all, I would also like to thank you for participating in our criminal justice system. You have been here what, two days before we finally got to you, but it's most imperative that we are able to talk to you, especially in light of the seriousness of the issue we are trying. I noticed that somewhere around here you are a native Houstonian?

A Yes.

Q And went to Aldine High School?

[p. 315] A Yes.

Q You live in that Northeast area?

A I live out Northside. In fact, I live in the same house I grew up in.

Q You still live in the same area, generally?

A Yes, sir.

Q And you work for?

A City of Houston, Parks and Recreation for the last thirteen years, just about. It's going to be thirteen years.

Q Probably since you got out of Texas A & M?

A I went into the Army and spent four months on active duty and came out and went to work for the City Parks and Recreation.

Q What area were you in in the military?

A I was in through basic training and combat.

Q And while at Texas A & M you majored in Park Administration?

A Yes.

Q Do you have some kind of kindred experience with the outdoors?

A I enjoy the outdoors a lot, yes.

Q Park Administration is something that one wouldn't normally think about if you're going to college. When did you first get the idea or inclination [p. 316] it might be a vocation that you might enjoy, sir?

A Somewhere around 1966, about my sophomore year. I wasn't happy in my major which, at the time, had been accounting, and so, I went to the vocational testing services up there and took some aptitude tests or something like that and I took some tests and they directed me into several different possible areas, which being in the outdoors had a lot to do with it.

Q Were you in the corps?

A Yes.

Q What was your highest rank in the corps?

A Lieutenant.

Q What church do you attend, sir?

A I don't attend regularly. I'm a member of Highcrest Methodist.

Q Now, in 1971, you were a juror in a criminal case?

A Yes, sir.

Q Is there anything about that experience that leaves a sour taste in your mouth for the criminal justice system for the State or the Defense?

A Well, as I said earlier, when asked the jury was [p. 317] not able to come to a decision on it, I think in my own mind, I would have been much happier had the jury been able to reach a decision in the case, but you know, it's not one of those things I have lost sleep over.

Q I can understand that. You indicated that you are or your spouse have studied law. Would you expound on that a little bit, sir?

A No sir, it says family. One of my uncles went through law school. He never passed the bar. He didn't take the test. He just wanted to get his law degree.

Q You indicated that you had some kind of interest in a criminal case, some kind of child abuse case?

A No, I'm sorry for misleading you on that. My wife gave birth to a stillborn baby about a month ago. I would be rather sensitive in handling a child abuse case and at the time I filled this out I didn't know what type of case was coming up.

Q That is fair. For your information there is nothing to do with that in this case.

A All right, sir.

Q Would you, Mr. Rayburn, share with me, sir, [p. 318] your feelings about the death penalty?

A Unfortunately, I think that the death penalty is probably the only effective way right now in deterring some offenses. You know, it would be nice if we lived in a world in which people never did anything really to harm anyone else or to kill anyone else, but we don't live in that kind of world, and my personal view is that the death penalty is a deterrent in many instances to crime.

Q By unfortunately, I take it that your explanation was that you wish we lived in a world where you didn't have to have it?

A It would be really nice if we lived in a world where there wasn't any murder, rape, child abuse, robbery or whatever. Unfortunately, I don't think that we are in such a situation.

Q How long have you had these feelings, sir? If you can remember?

A I really, you know, I don't remember any particular time in which I said, hey, all at once, I'm in favor of the death penalty. I don't think I have ever been against the death penalty. I know, you know, when I was growing up in Texas we had a death penalty for certain [p. 319] things. I know it was dropped for several years by the Supreme Court, more or less put a hold on it or outlawed it. I know that in Texas again the death penalty has been put back in effect for certain crimes. I could not tell you off the top of my head what all the crimes are which would come under the heading of the death penalty.

Q Do you also understand, sir, that we are guided through a criminal justice process by some statutes

enacted by the Legislature called The Code of Criminal Procedure?

A Yes, sir.

Q Because on the trial of a capital offense, a defendant does not have a choice of waiving or giving up a right to a jury trial, thereby, letting the Judge hear the case. This is the only instance where if you get to the punishment phase that the jury must assess punishment. Now, because of this we must discuss your feelings on punishment, if we get that far, but is there any way that you would hold it against the defendant or might think that because we are discussing the punishment phase that we are looking ahead to him being found guilty?

[p. 320] A No sir, I don't think at this point, I'm sure you're not looking forward to the defendant being found guilty nor am I because I couldn't vote one way or the other, sir, until I heard what the Prosecution has to say.

Q And you wouldn't hold that against him because we are discussing things we are mandated to discuss if we are going to discuss them?

A No, sir.

Q Toward that end, sir, should we get to the punishment stage, the jury verdict slip is different from the guilt or innocence stage on the punishment. You are asked to determine whether a person committed an offense as alleged in the indictment and based on the evidence and you also will be required to take an oath that based – that you will a true verdict render according to the law and the evidence. Now, when we talk about the punishment phase we are talking about as to special issues. These

special issues must be entered unanimously in order for the end result to be that the Judge, as mandated by the Code of Criminal Appeals, not the jury, sentences the defendant to life – I'm sorry, to death. Now [p. 321] would the fact that your answering special issues and only those special issues, even though you know it may result in the end result, but you are not assessing the death penalty, would that affect your ability to be fair and impartial or would it make it easier for you to answer the questions yes, knowing that you are not in effect assessing the death penalty, but it is in effect, the Judge?

A I'm not sure I understand that. Could you try that again?

Q I may not understand myself on that one. But let me see. Simply, would the fact that the Judge would be the person sentencing the defendant to life make it easy for you to review the issues presented and answer yes because it is not you doing it, it's the Judge doing it, and it takes some of the pressure off of you?

A To me, I don't think it would make that much difference. I would have already, or somewhere along the line there, in my own mind, I would have come to a conclusion whether it was the Judge doing something or me, personally, standing up or you standing up and doing it. I don't think it would make that much difference.

[p. 322] Q Because basically, the end result is there?

A I think once I reached, in my own mind, the conclusions that I am going to come to, then I think it gets

into no matter who it is that it's actually going from that point on, I have still reached it in my mind.

Q Okay, can you conceive, sir, the point that you are talking about in your mind? Can you conceive a fact situation that would put you at the point that you are – would take to get into your mind in order to vote yes?

A If I understand the question right, that you are saying, sir, I think I could. I'm not – yes, I think I could.

Q Could you share that with us, please, if you can? I'm not trying to ask you to do the impossible.

A I don't know that I can put it into words.

Q Okay.

A It's kind of a feeling inside of me. It's about this whole process, that, you know, it's very hard. I would have to hear the entire thing. I would have to hear everything, every detail of information that I could before I can answer any of the questions, one way or the [p. 323] other. Coming to the conclusion in my own mind would be a very hard process for me, but yes, I could draw my own conclusions.

Q That is a fair statement, and again, let me assure you that we are not here and none of us are going to argue with what your feelings might be.

A Right.

Q And there are no right or wrong answers because what we are just trying to do is get to know you in a very limited time to determine how you feel about certain things, and if you can't answer them, I assure you, I'm

not going to try to argue with you. If you can't tell us that will be fine, too.

Now, as to special issue number one, can you see a situation where the person might go into a store with a gun, with the intention of robbing and somewhere along the way, as plans sometimes do, something goes awry, things change and as a result somebody is killed?

A Well, I can see where somebody could go in with the intention of robbery, and of course, you know, things could happen which could cause somebody to be killed. I might as well say right [p. 324] off the bat, though, I think, anytime you go into a place with robbery in mind, carrying a firearm, you have to go in with at least a very strong possibility in your mind that you may have to end up using the gun.

Q Yes sir, I can understand that, but – well, do you feel as a result of that, sir, that the person has already formed in his mind the intent to kill, if necessary?

A No sir, I don't think that it's necessary that the person has formed intent to kill at that point. I'm just saying anytime a person goes into a store or anywhere else with a gun in their hand, they have to be aware of the consequence of their actions that they may get into.

Q Okay, now, along the same lines, although the person may not have formed the necessary intent to kill prior to going into wherever the person went into with the gun, would you automatically find that if the result of going in there with a gun, he used it to kill somebody, although he might not have had the initial intent, could you find that the killing was deliberate, automatically?

Do you understand the question [p. 325] I was trying to ask?

A I'm trying to formulate an answer on here.

Q All right.

A The act squeezing the trigger or something like that could come up whereby the person went in the store, I think, without intending to use the gun, however, I can see some circumstances or things that could arise in which a person pulled a trigger. Okay, I don't think necessarily that the person went in there intending to kill somebody, but I think that you do have to consider the fact that the person did go in with a firearm.

Q Well, could you ever conceive of a fact situation where a person went into a store to rob with intent to rob, without the intent to kill and did kill and find that that person did not deliberately kill?

A In my own mind, I could think of a circumstance in which the person killed somebody as a result of maybe a struggle or something like that and the gun went off. I can see that, yes, that person did kill somebody. They didn't go into the place deliberately to kill anybody, but the act did happen.

[p. 326] Q Okay, as relates to special issue number two, whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, sir, what kind of information would you like to have brought to you to help you to make that type of determination?

A Everything I can get ahold of, whether it's character witnesses, reports from the probation people or

whoever is involved. I'm sure there is bound to be somebody who has talked to this person, somebody who knows the person, whether or not the person has a criminal record, and if so what kind of crimes, maybe. Even, I think when you are getting into this thing that is presented, it can't hurt. It has to help me to draw whatever conclusion I'm going to draw on it.

Q Now, would the fact that the person had committed other criminal acts of violence automatically make you vote yes to special issue number two?

A I don't think that any one or two admissions of that nature would automatically cause me to vote. I think people are very complicated, and I think it takes a lot of things before I could [p. 327] draw my conclusion one way or the other, sir.

Q Do you think, sir, if a person were sentenced to life in the penitentiary that they would be a continuing threat to society?

A Well, sir, there is not too much liklihood [sic] of that happening while they are in the penitentiary. I don't know for sure what would happen when somebody gets out of the penitentiary, if that were the situation, I, you know, I would like to hope that if somebody goes to the penitentiary or I would like to think if someone goes to the penitentiary that they actually learn something from the time they are in there, and I don't personally- personally, I don't regard penitentiary time as being the complete - just a lockup.

Q Just a wholesale warehousing?

A I would like to think that it is not.

Q And you also understand, sir, that in considering the punishment phase of this trial, if we get that far, that in assessing punishment, you could not consider whether, if you gave a life sentence when or how or what would happen to the person as regards to parole. That is completely within the purview of pardons and [p. 328] paroles and not to be alluded to?

A I'll take your word for it. The jury's duty would be to say if that is life imprisonment, that is the jury's part, that is where it ends. After that, I guess it is the Department of Corrections'. I don't know. We are past that point.

Q Special issue number three is only presented to you if it is raised by the evidence, that being a determination made during the trial by the Court. Can you, sir, in light of the fact that self-defense – well trying – strike that. Do you believe in the idea of self-defense?

A In the idea of self-defense as such, yes.

Q Do you also understand if you are committing a crime and happen to kill somebody because they are trying to kill you, you are not availed the opportunity of that defense as a method of getting out of what you started? Do you understand that? Do you have any problems with that?

A No sir, I don't think so.

Q Do you agree or disagree with it, not the issue but the fact that the question I was asking you, if you still remember it?

[p. 329] A I do not think that if a person got into an act, I don't think they should be allowed to claim self-

defense as a means of getting out of it. Does that answer your question?

Q Yes, sir. Yes, sir. Can you in your own mind conceive of a set of facts and circumstances whereas the dead person did something to provoke the defendant, who had no intention to kill and as a result of what he did, not necessarily pulling a gun, we don't have to get to that extreme of pulling a gun or knife or something else, but whatever he did, if only to protect himself to swing out, to grab, to move, to push the defendant during the course of the robbery, thereby provoking what might be an immediate act of reaction?

A I think, sir, that in all honesty, I can view some things, would not even have to be an act, it can be a word in which conceivably it could trigger the shooting.

Q Let me ask you one question, sir. Are you now of the frame of mind that if you were sitting in this seat where Gary Graham is sitting, that you would be comfortable, having a person of your convictions making a determination, one as [p. 330] to guilt or innocence, and two, as to life or death with regard to your person?

A Yes sir, I honestly think that I could at this point.

MR. MOCK: Your Honor, that is all we have of this witness.

MR. HOBBS: The State will accept.

MR. MOCK: We will accept.

THE COURT: Will you swear the juror, please, Ms. Clerk?

(At this time the juror sworn by the Clerk)

THE COURT: Mr. Hoover, you are now excused. As I have told you, it will probably be, according to our time table, hopefully a week from Monday when we begin testimony. We have your home number and your business number that we can reach you at. We'll give you several days advance notice, hopefully, as to when the testimony would begin. It would not be before the 26th, I don't anticipate.

MR. HOOVER: The reason – we may go ahead and take that vacation a week early.

THE COURT: I don't anticipate that being the situation. We have two jurors in two [p. 331] days. We have to have twelve. So I don't anticipate that happening. You might, if you are going to go out of town on vacation, you may want to take the phone number of the Court with you and possibly check in from time to time while you are on vacation to see what our situation is. Mr. Pollinger can give you the phone number of the Courtroom and the names of the Court personnel that you can reach to see where we stand. We will contact you far enough in advance. Please do not – I don't know or anticipate there will be any media coverage about this case until the trial actually starts, however, in the interim, one word of caution. Please do not speak to anybody or review any media coverage with regard to whatever allegations may be pertinent to this case. With that, you are excused, and Mr. Pollinger will provide that information for you. If you need any written verification for your work as to the fact that you have been here, Ms. Hamilton will provide that for you.

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[p. 540] MR. DENNIS GRAHAM, called as a prospective juror, after having first been duly sworn, testified as follows:

EXAMINATION BY THE COURT

Q In the interest of time, Mr. Graham, obviously, we will be as brief as we can be. Let me ask you initially about the comments I presented to the panel as a whole this morning. Do you have any questions, areas or things I discussed with you on the panel as a whole that is unclear for you?

A I don't have no questions.

Q None of the items I discussed presented any problems for you, presumption of innocence, burden of proof, the order in a criminal trial as to the fact we have a two phase trial system and the fact that the defendant is presumed innocent until proven guilty, all of these principles, you understood?

A Pretty much.

Q As I told you, Mr. Graham, this is a very serious proceeding, and also very time consuming proceeding that our law requires that we do it this way. In the interest of [p. 541] the community and specifically in the interest of the defendant, Gary Graham. As I told you, the 12 persons who serve on the jury in this case will be faced with the decision if the punishment phase of the trial is reached, and only if the punishment phase of the trial is reached, of determining whether or not the defendant, if he is found guilty, is to be sentenced to life in the Texas

Department of Corrections or to death by lethal injection. It is obviously paramount, and that was the reason I spoke with you specifically about this before lunch, that we know you [sic] individual feelings with regard to the death penalty as a type of punishment. Our law requires for both sides that I ask if you have any religious, conscientious or moral scruples against the imposition of the death penalty, as the punishment in a proper case, in a case that you would deem proper?

A. No, not if it is in a proper case.

Q So, what you are telling me is if the State convinced you beyond a reasonable doubt that the defendant was guilty and you had voted a verdict of guilty of the offense of capital [p. 542] murder, and you were convinced beyond a reasonable doubt that the punishment should be assessed at death, that you could return a verdict, knowing full well that I, as a Judge, would sentence the defendant to death, is that correct, sir?

A That is correct.

Q Obviously, we are not talking about every capital murder case. We are talking about one that you would deem proper, and in the trial of a capital murder case, there is a definite proceeding that is followed by which a jury communicates its verdict to the Court. As we told you before lunch, I do not have the authority to change that verdict. The verdict is or the verdict that is returned by the jury is done in response to special issues that are submitted to the jury. I do not send in with the Court's charge a blank piece of paper and tell the foreman to write down life or death. It is not done that way because there are deliberations that the jury has to consider on the

punishment phase of the trial that go beyond the deliberations that took place on the guilt or innocence phase of [p. 543] the trial. Those deliberations pertain to two special issues, at least they are presented to the punishment phase of a capital murder trial that is tried in this Court throughout the state and throughout this country. Those two special issues are tacked to the bulletin board, which is to your right. Let me make some general comments about these special issues before we get into a discussion as to what they contain. Each of the special issues on the board, if the jury is to answer the special issues yes requires a unanimous verdict by the jury. If the jury is to answer either of the special issues or both or all three, possibly, no, a vote of 10 to 2 or at least 10 of the jurors are required. If the jury votes no on any of the special issues requires at least 10. It does not require a unanimous verdict for a no answer, but it does for a yes answer. If the jury answers both yes or possibly three, all three special issues yes, then the jury has communicated to the Court that the defendant is to receive the death penalty. His punishment is to be assessed at death. If there is one no answer [p. 544] or more than one no answer, the punishment is assessed at life in the Texas Department of Corrections. A unanimous verdict of yes to all special issues submitted, the punishment is death. Do you understand?

A Yes, sir.

Q Once again, the State has the burden during the punishment phase, as it did on the guilt or innocence phase. The State has to prove beyond a reasonable doubt that your answers should be yes to each of those issues. The defendant has no burden to present anything. Once

again the burden is completely on the State of Texas. Then you answer should be yes, do you understand that?

A Yes.

Q I do not have the authority to change your answers or assess punishment that is in contradiction with your answers. If your punishment mandated by your verdict is the death penalty, I must assess punishment at death. I cannot contradict your punishment and that is true either way. If you vote the death penalty, I can't change it to life. If you vote life, I can't change it to death. [p. 545] Do you understand that?

A I understand.

Q I would ask you to take a moment to look at special issues number one and two that are pined to the bulletin board. Read them and see if you have any difficulty understanding them, and then we will talk about them. The first two issues that are on the board. Do either of those present any problems to you as far as being able to understand what is presented on those cards, sir?

A No, they don't.

Q Let's talk initially about special issue number one. That issue there is whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another person would occur. I think it is apparent that when we submit that issue to you, it is calling upon you to reflect back upon the testimony that you have heard on the guilt or innocence phase of the trial with regard to the conduct by the

defendant in taking the life of the deceased. In this particular case, Gary [p. 546] Graham, allegedly taking the life of Bobby Grant Lambert. Now, in reflecting back on that testimony, you are to evaluate that testimony in light of key words that are included in that special issue. The first word that I consider to be a key word is the word, deliberately. In choosing to follow the course of conduct that the defendant has followed in which the death of the deceased resulted. Did he do so deliberately? Was it his conscious objective to do that? Was it his intention to do that? Obviously, we are looking at something that is the opposite of accidental. It is a voluntary fact on his part to do so, and secondly, did he reasonably expect that the death of the deceased or another person would occur. Should he have reasonably expected or did he reasonably expect that this would happen, this would result in death. I think that two hypothetical situations may show a variation in how you might answer the issue.

Assume that you are working or that someone is working at a Stop and Go as a clerk, and a person walks in with a pistol, walks up [p. 547] to the clerk and demands the money that the clerk has behind the counter. The clerk fills up the bag, hands it to the defendant and the defendant takes, the robber takes two steps toward the door and just turns, in cold blood guns down and kills the clerk behind the counter. The clerk has done nothing to provoke the situation, has not pulled any weapons or done anything. In viewing that course of conduct by that robber, in that situation, you as a juror, may say yes, the conduct was committed by the defendant deliberately. It was his conscious objective to walk in the store with that pistol and his conscious objective to

shoot and kill that clerk and in shooting the clerk he did expect to cause that clerk's death. You might very well answer that yes, it was done deliberately and he reasonably expected that the death would occur. After answering special issue number one, you then go to special issue number two, which deals with a prediction by the jury as to the future of this defendant. And assuming that he would not in a situation he finds himself, but assuming he is out [p. 548] among the other members of our society. Is there a probability that if the defendant were returned to that society that he would commit criminal acts of violence that would constitute a continuing threat to society. Now, that is not to say that it is a certainty. Obviously, we could not predict the future with certainty. All we are asking is, of the jury, is to predict to the degree of probability. Is it more likely than not that he will commit the act of violence. Acts of violence obviously is a term of art. It is not going – it is not very specific because our law encompasses many crimes that qualify as acts of violence. If you are walking toward the elevator and bump into someone in the hall intentionally and that person found it to be offensive, you possibly would have committed a Class C misdemeanor assault. Or by the same token at the other extreme, we have the offense that Mr. Graham stands charged with, the offense of capital murder, which is at the opposite end of the extreme. In between there are a multitude of things. Aggravated robbery, aggravated rape, and aggravated [p. 549] kidnapping, assault, acts of violence against property. Someone rips the seats of your car with a knife. These are all acts of violence and it is broad because our legislature intended that you, as a juror, would call upon you conscience in answering this

special issue. And do you further find that these criminal acts of violence that the defendant probably would commit constitute a continuing threat to society. Would the defendant, if he were replaced in society commit these criminal acts of violence to the extent he would be an ongoing threat to society or those around him. Do you understand that, sir?

A I do.

Q Okay, have you any problems understanding either special issues one or two?

A No.

Q It is obvious that what we are looking for is someone, as I told you previously, who can enter into this type of situation with an open mind. Someone who will not have a knee jerk verdict based on what he has heard in guilt or innocence phase of the trial, but [p. 550] someone who will deliberate on the special issues and hold the State to the burden that our law requires. Can you do that, sir?

A Yes, I can.

Q Okay, now, as I said if you serve as a juror in this case, and the punishment phase is reached, you will consider at least those two special issues. I do not know the facts in this case. I do not know anything about the facts in this case, nor do you. Only the lawyers know something about the facts in this case, but our law requires on the punishment phase of the trial that if there is any evidence, no matter how slight and no matter what the source is that the person who was killed, in some way added or contributed to the difficulty by some form of

provocation, this must be incorporated in another special issue for the jury's consideration. It's not to say that it provides any defense for the defendant by saying that he defended himself against some actions by the deceased, because the defendant, in a capital murder case, has been found guilty of capital murder, once you are on the punishment phase, and by provoking [p. 551] the difficulty in my example of the Stop and Go, my walking in that store with a pistol, even though he may not have an intent to take someone's life, he has provoked the difficulty and cannot claim self defense if that clerk were to pull a pistol out from under the counter. If you would, sir, read special issue number three, and we will talk about that some more. In my own opinion, I don't think special issue number three is drawn as clearly as one and two. It is a little more difficult to understand, but what we are trying to view here is the conduct of the defendant in killing the deceased at this point in time you voted guilty yes, he killed the deceased, but what we are doing is asking you to consider number one, was there any provocation to the problem of either person that was killed. If he did in some way assist in provoking the problem. Did the defendant in taking the deceased's life act unreasonably. And if he did, if you feel after the verdict has been or after the evidence has been presented, that he did act unreasonable [sic] in taking the deceased's life then [p. 552] you would answer that special issue yes. If you found that I did not act unreasonably in taking that person's life, then you would obviously say no. I realize it is very difficult to conjure up in your mind any feeling that a person in defending his property is acting in a fashion that you would condemn because he is seeking to

defend his property. The clerk for pulling the pistol out from under the counter, but the law is not seeking to condemn that person who was killed in any way. The only reason this is pertinent is because this issue is presented to see if there is any type of mitigation or lessening of what the punishment should be because the dead person, in some way, contributed to the difficulty. Special issue number three has the same import as either of the first two special issues, if you, as a juror were to answer special issue number three no, then the defendant would be sentenced to life in the penitentiary, just as he would if you were to answer either special issues number one or two no. For the purposes of example, let's talk about the situation in [p. 553] which the person, the robber has walked into the Stop and Go and not intending to kill anyone, but to just take the money. Just to take the money, the property. He takes the property or the money from the clerk and turns to walk from the store and in turning to walk from the store, the clerk pulls a pistol from under the counter and shoots him in the back, and then, as the defendant turns, he is shot again by the clerk, and so he fires and kills the clerk. Now he has not harmed the clerk up to that point in time. He has done nothing to take money from him and he kills the clerk. He is trying to stay alive and takes another person's life to stay alive. He can't claim self defense. The clerk has defended his property, but the defendant is still guilty of capital murder, even though he didn't fire first. He is still guilty of capital murder because he has committed the felony offense of aggravated robbery, and in so doing, killed the store clerk, even the clerk – even though the clerk fired at him first. You can't view that situation in

opposition to the situation where he walks in [p. 554] and cold bloodedly goes to the clerk and the clerk has done nothing to provoke him at all. He is standing there and he is gunned down in cold blood. You can see, even though the defendant in both the hypothetical situations is guilty of capital murder, you might view the actions of one differently with regard to a decision in you mind as to whether should one live and should one die. Possibly that. Once again, what we are trying to find is to insure and once again I'm not trying to dissuade you from any of your opinions or we have to find out and make sure how you understand that we are hoping to find people who will have an open mind when they consider these issues. Do you see the distinction in the fact situations I gave you, sir?

A Yes, I do.

Q Do you see in one situation that the deceased in some way has added to the provocation or his position in the situation by pulling the pistol and firing it at the defendant, even though the defendant did not do harm to the clerk by taking the property?

A Yes, I understand that.

[p. 555] Q Do you feel in considering these special issues you would have an open mind and you would not vote automatically one way or the other until you have heard all of the testimony in the case?

A I wouldn't say nothing until I have heard everything.

Q Okay, you understand, sir, that the mere fact that you have found a person guilty of capital murder should

not be sufficient for you to assess punishment at death. In other words, there are plenty of cases tried in this Court where someone has been murdered where the death penalty is not an alternative. What we are talking about is the situation as has been explained to you as, as I have explained to you what constitutes capital murder, but your decision with regard to the defendant being sentenced to death should only be made after you heard other testimony with regard to these special issues. Do you understand that?

A Yes, sir.

Q Could you agree to abide by that?

A Yes, I could.

Q Do you have any questions about what I have [p. 556] talked about up to this point, Mr. Graham?

A No.

Q The lawyers will now have a chance to talk to you. Mr. Hobbs, the Assistant District Attorney, and then Mr. Thornton will be talking with you. Mr. Hobbs?

EXAMINATION BY THE STATE

QUESTIONS BY MR. HOBBS:

Q Hello, Mr. Graham. As the Judge told you, my name is Carl Hobbs, and I am an Assistant District Attorney, and I am assigned to prosecute in this case. From time to time there might be other Assistant District Attorneys that will aid me, but right now I am it, okay?

A Okay.

Q I am looking at the form that you filled out, this long form. There was some areas that I see why you didn't answer some of them because you are single and they apply to your spouse. Were you in the military service at all, sir?

A No, sir.

Q Okay, do you have a particular religious [p. 557] preference?

A No.

Q Okay, would you consider yourself a believer, but no particular –

A I am a believer.

Q Okay, now, has anybody – you are – you or anyone in your family or very close friends been the victim of a crime, car stolen or house burglarized, something stolen from you?

A I had a friend who had a truck stolen.

Q But nothing from you?

A No.

Q Have you ever been a witness in a criminal action?

A No.

Q Or any of your family?

A No.

Q Have you or any member of your family or close friends been charged with an offense where they were the defendant?

A No.

Q Okay, you said you have a brother that is a security guard?

A Was a security guard.

Q What is he doing now?

[p. 558] A He is doing odd jobs, works a while and quits and works somewhere else.

Q In the aspect of, in some of the jobs you worked in a lot of food establishments, is that correct?

A That is correct.

Q In those aspects, at any time you were working in one of those were they robbed or some crime committed there?

A No.

Q You are very fortunate. Now, looking at the first phase of this case, or any case is the guilt or innocence stage, okay?

A Okay.

Q Before we even consider the special issues we have to look at the aspect is the defendant guilty or not guilty of the offense of which he is charged. Okay?

A Okay.

Q We are not going to be talking about the facts of this given case, these particular facts because the law doesn't allow us to do that. We are going to be talking in make believe facts or hypothetical situations, examples to generate comments from you. Okay?

[p. 559] A Okay.

Q Now, burden of proof is on the State. That is beyond a reasonable doubt. That doesn't mean beyond all doubt or beyond a shadow of a doubt, because if it was beyond all doubt, you would have to be actually present and if you were present and saw what happened, you would be a witness, not a juror. Would you agree with that?

A I agree with that.

Q Now, we don't have to prove why somebody did something, a motive. Does that give you a problem?

A No, it doesn't.

Q Okay, now, when we are coming back you, as a juror, have to decide the evidence that you hear and the testimony you hear from that stand any physical evidence, if there is any. Sometimes there is and sometimes there isn't. That might be presented. Now, you, as a juror, can believe all of what a witness says, part of what they say or absolutely nothing. That is your job. Now, we, the mere fact that we are here means that there is conflict. The mere fact that we are here. If we agreed, we [p. 560] wouldn't be here. The jury's job is to resolve conflict, okay?

A Right.

Q Conflict, in and of itself is not reasonable doubt, depending on what it is. Would you agree to that?

A I agree.

Q Now, also, our law states that an individual, when that individual attains the age of 17 years old, is

considered an adult for all purposes considering the law and the punishment set by the criminal law. Does that pose a problem with you, sir, the mere age of the defendant?

A No, it doesn't.

Q Okay, now, looking at the young man sitting at counsel table, here, he is young. We are looking at a very serious offense. The mere fact that he is a young man, would that cause you to either to be prejudice one way or the other to such a degree that you would have to go against your oath as a juror to a true verdict render, according to the law and the evidence presented?

A No, it wouldn't affect my decision.

[p. 561] Q Okay, now, when we are looking at the aspect what must the State prove beyond a reasonable doubt. The State must prove the elements of the offense. That is what we must prove beyond a reasonable doubt. That and only that. What are those elements? The Judge, remember when he read the indictment to you. I am going to go over the part in reference to capital murder because that is what I want you to consider. Okay. First of all, capital murder is also going to be the committing a murder and another felony. In this instance, robbery, or the offense of aggravated robbery. And I will give you a shorthand rendition of what murder is, the voluntary killing of another human being without legal excuse or justification. No excuse. No legal reason. And intentionally taking a life. We are going to be looking at that. Now, here are the elements: That it was the defendant, Gary Graham; that it occurred on May, on or about May 13, 1981; in Harris County, Texas; that the defendant did

then and there unlawfully, while in the course of committing theft, I mean committing or attempting to commit the [p. 562] robbery of Bobby Grant Lambert, intentionally caused the death of Bobby Grant Lambert by shooting Bobby Grant Lambert with a gun. Those are the elements.

A Yes, sir.

Q Those are the things that the State must prove beyond a reasonable doubt. Not what color pants he had on or not what color his car was, if there was one, or what color the – what quarter the moon was in that night. It is irrelevant and immaterial. Do you have any problems with that, sir?

A No, I don't.

Q Okay, now, those are the elements that the State must prove beyond a reasonable doubt. Now, when we are talking about that, let's talk about the aspect of a single witness. Okay. In a lot of instances, a crime is not going to be committed – many crimes – very few crimes are committed where there is a great amount of people involved. Sometimes it could be just a one on one crime where one person might have seen what had happened. If you believe that person beyond a reasonable doubt when that person got up and testified and [p. 563] said that the defendant did the killing and you believed that person beyond a reasonable doubt, the State has proven each and every one of those elements, could you base a conviction on the testimony of a single witness, with nothing more?

A I believe I could.

Q Okay, now, let me give you a hypothet. Let's talk about this. Okay. In a hypothetical situation, let's say this room is a convenience store, 7-Eleven. Okay?

A Okay.

Q And you are in the store and can you see the clerk, Ms. Hamilton right across the way there, clearly?

A Just the top of her had.

Q Let's say there is an obstruction, something like that where you are off in the corner of the store and about in the same situation except a little higher. You can hear or maybe get a glance, but like you say, you can't see her. Okay, now, let's sit Mr. Mock over here in the jury area with some type of pictures like this and Mr. Thornton is right here where he is at, right here in the open area [p. 564] where he can see you and he can see Ms. Hamilton, and I am going to be the person, I'm going to be the criminal. I come in through the door, okay?

A Okay.

Q I walk up to Ms. Hamilton at the register. I demand the money and she looks at me and she doesn't say anything. I demand the money. She doesn't do anything. I pull my gun and demand it and as soon as Mr. Mock sees the gun, he exercises some common sense. He is hitting the deck back there hiding. Okay?

A Okay.

Q You can't see me when you hear something going on, but there is an obstruction here. Mr. Thornton sees me, but he doesn't have any place to go and when I see Mr. Thornton I shoot and kill Ms. Hamilton. Okay, so

when I get caught later on and I am brought in, I am being tried for capital murder. Now, there was four people in this room or in the store, and the only person that is going to be able to say that I did it was Mr. Thornton. She is dead and he was ducking from the gun and he couldn't see, okay?

[p. 565] A Okay.

Q If you believed the State has proved each and every element beyond a reasonable doubt, Mr. Thornton got up and testified that Carl Hobbs shot and killed Ms. Hamilton in the course of that robbery and shot her with a gun, if you believe his testimony beyond a reasonable doubt, could you convict me of capital murder?

A Yes, I could.

Q Okay, now, okay, now, let's move on to the next aspect of this. We have – we are going to go into the punishment phase now. I have been found guilty of capital murder, and you are going to decide right now whether I live or die. Okay?

A Okay.

Q Now, what we are going to be looking at is, in the first phase you can consider all the testimony that you heard in the first phase of the trial. And the example we just gave you, what I did when I came into the store, okay?

A Okay.

Q Now, what I was doing, from the testimony that you heard from everybody. Now, as you can see, [p. 566] special issue number one, whether the conduct of the

defendant that caused the death of the deceased was committed deliberately and with a reasonable expectation that the death of the deceased or another person would occur, okay?

A Right.

Q Now, needless to say that question, by its very wording, requires you to look at the situation during that first phase of the trial. What actually happened in the offense. I have been found guilty of it now and now that I am guilty of it, you have to look and see whether or not – what I did was committed deliberately. Now, the word deliberately is not going to be defined for you. Okay?

A Okay.

Q Webster defines it as being willful or voluntary. Does that pose a problem for you?

A No.

Q It doesn't mean premeditation. Would you agree to that?

A Yes, I agree.

Q And furthermore, it also doesn't mean accidentally. It means that I wanted to do [p. 567] what I did.

MR. THORNTON: I object to the State's leading.

THE COURT: Don't lead your witness, Mr. Hobbs.

Q Now, in looking at this word, now we go back down to the next part, and let me give you a hypothetical.

In reference to whether or not an act can be deliberate in a span of time? Okay?

A Okay.

Q Say I came – I had never met you before, never seen you before. I just walked through the door and I came up to you and I walked up and in front of you and say you had a red shirt on and I don't like people in red shirts. I just saw that red shirt and the first thing I did was walk up to you and hit you in the jaw as hard as I can hit you. Now, up until that time I just walked in and saw you momentarily and my act – could you conceive my act as being a deliberate act of hitting you just absed [sic] upon that split second I see the red shirt and don't like it and I hit you, my actions?

[p. 568] A I can see that.

Q Okay, now, when I come – now we are going to be talking now in the situation going back to the hypothetical, and where I shot and killed Ms. Hamilton, okay?

A Okay.

Q In the example that I gave a while ago, that I am found guilty of capital murder, now, reasonable expectation that the death of the deceased would occur. Okay, at the second phase, you have to look at what is there. In a situation could you, viewing the evidence and I'm not asking you for a commitment, but could you, in using that hypothet, just as an example, but could you arrive at an answer whether or not there was a reasonable expectation that the death of the deceased would occur, based upon – just upon the evidence that you saw and the facts that you heard in this phase?

A You want me to answer?

Q Could you?

A Yes, from the evidence.

Q Okay, so you would look at the evidence and you would be able to answer?

[p. 569] A Yes.

Q And be it whether or not it was a reasonable expectation of what I did, would end in the death of the individual?

A Right.

Q Going into special issue number two, we get into another aspect, another word that is not going to be defined and we are going to be looking at the probability. Now, probability is not defined. Likely, more than likely, possible. It doesn't mean absolutely. Would you agree with that?

A I agree.

Q Okay, now, when we get – how would you define probability, sir, or do you have any definition?

A Well, I don't have one right off the –

Q Remember what the Judge told you about criminal acts of violence, they could be as little as criminal mischief an act of violence toward property. I went out and slashed somebody's tires at a parking lot. Took a knife out and went across this table or across the bannister, and intentionally acted to damage or destroy. If I came up and I touched this lady's hair. The mere touching of her [p. 570] if she felt that it was offensive, and I

did it and she didn't want me to touch her. That is an assault. That is a criminal act of violence. All the way up to if I slugged the gentleman here. I hit him. Shot him. Or we are getting back into robbery, rape, murder, capital murder, okay?

A Okay.

Q During the second phase of the trial this is where that evidence which the Court feels relevant – is it admissible to come in and help you answer special issue number two. Okay?

A Okay.

Q Whether there is a probability. Whether there is that probability. Now, my looking at my actions in the case in chief in a hypothetical situation that gives you some insight into what type of person I am or does it or does it for you in that particular hypothetical?

A Yes.

Q Okay, now, whether or not I would commit criminal acts of violence. Now, what is admissible in this stage. Prior record, if any of the man in the hypothetical I was going [p. 571] into. Other criminal acts of violence, if any, that I might have committed, or reputation witnesses. Okay, and then to answer that question whether or not that probability exists whether I would commit those criminal acts of violence that would constitute a continuing threat to society. Okay. Not an absolute thing, that it is absolutely certain, but is it likely that I am going to do it based upon what I have done. Now, one of those aspects would you agree with me that although you might not look at it, but as an aspect in this sentence is

life or death. Two yesses mean death, okay. One no means life. When we are looking at that aspect, would you agree with me that people that are in prison, confined in prison, are part of our society, too?

A Yes, I agree.

Q So when that aspect of taking society as a – in totality, the people are out here that are not confined and the people that are confined in a prison or jail are also a part of society, and the guards that work there or the police officers that work there. [p. 572] Whether or not – so when you are looking at special issue number two, whether those probabilities of criminal acts of violence not only to somebody that is outside free, but that same person in my case in a hypothetical there – would I be a threat to those types of people, to the guards, to the other prisoners. This should be considered. Do you have a problem with that?

A No, I don't.

Q Okay now, special issue number three comes up only if it is raised by the evidence. It doesn't excuse the fact that a capital murder was committed. You understand that, sir?

A Yes.

Q Now, special issue number three is whether the conduct of the defendant in that case in a hypothetical, whether my conduct, what I did, okay, in that type of the killing of Ms. Hamilton was unreasonable in response to any provocation, if there was any, okay?

A Yes.

Q And she was the deceased. The question that you – would you have an open mind to look at the facts if that was there and you would have [p. 573] to look at, once again, going back to the original fact situation, okay?

A Okay.

Q Special issue number two is going into a probability, looking at that, plus some other things, special issue number one, based upon the facts, special issue number three on that. Let's change the fact situation around a little bit. Say that you know the Judge gave you an example, remember the liquor store thing. That is one extreme where it is easy to see that, say, I was going out the door, I was already out the door, I had pulled the gun, but I had the gun stuck in my pants and I said I have got a gun and showed it. Okay, and she gives me the money. I didn't even pull it, and I go out the door and I am at the door and she picks up a gun and she shoots me in th back, and I hit the ground and I turn and she shoots me and I start getting up and she shoots me in the leg. I grab that gun and I see she is fixing to shoot me again, and I shoot. I'm still guilty of capital murder. I killed her. But then, you are judging on what my provocation was, what she did before I killed [p. 574] her. Okay?

A Yes.

Q And what I did in response to what she did, if anything, was unreasonable, okay?

A Okay.

Q I can't have self defense because I can't claim that. Okay?

A Okay.

Q Now, you can go the other way. We are just standing there and anything in between, okay? Just because what in essence, they are saying is if you believe that was what I did in killing her was unreasonable, you can answer yes. If the State has proved it beyond a reasonable doubt, that is yes. Then I take – you answer yes here. Yes here and yes here. Would the fact, knowing that those yes answers would result in the death penalty give you any problem, sir?

A No, it would not.

Q Even if I was 17 years old?

A No, it would not.

Q Do your realize in the definition of robbery, that that means in the course of committing theft, I don't even have to get any money. [p. 575] The mere fact I pulled the gun is enough. If I get some, that is something, or if I try to get it and I commit it. Sir, is there anything in your mind that you would like to ask me about that I haven't asked you or something that is unclear, in response to something we have discussed?

A No.

THE COURT: Anything else, Mr. Hobbs?

MR. HOBBS: No, Your Honor.

THE COURT: Mr. Graham, now Mr. Thornton, the defense attorney will ask you some questions. Mr. Thornton?

MR. THORNTON: Thank you, Your Honor.

[p. 576] EXAMINATION BY THE DEFENSE

QUESTIONS BY MR. THORNTON:

Q Before I question the juror, may I approach the bench a second?

THE COURT: Yes, sir.

(At this time a discussion off the record.)

Q Mr. Graham, I am going to move over a little bit so we can see each other a little bit. My name is Chester Thornton. And I am a defense attorney, and this is Ron Mock, who is counsel in this case, and we represent Gary Graham, the defendant in this case. At this time, may I have the opportunity to ask you certain questions and my questions at times might appear personal, because they are personal, and they are direct. The reason that we are allowed to ask personal questions is so we can understand the individual who has the responsibility of determining whether or not somebody shall live or die. You would agree with me that is a very serious predicament that you face and the [sic] we all face at this time?

[p. 577] A Yes, I do.

Q Okay, so, my questions aren't meant to embarrass you but only to get your personal beliefs on certain issues. Okay. I am of the opinion that my beliefs are my beliefs, and I hold those beliefs regardless of what other individuals think of my beliefs, and regardless of whether or not they might not agree with them, if they are my beliefs I hold true to that, and what I am asking you to do is just expose yourself in a sense and be truthful in your answers to me. Okay. I know you have been in Harris County approximately 13 years. How did you happen to

get in Harris County from Florida? Was it a transition move?

A My dad got laid off at the Cape and he got a job out here at Nasa.

Q You are a mechanic helper at the Wittingham Company, is that correct?

A Yes.

Q What is your job, what do you do?

A The job, it is repairing pumps and compressors for the chemical companies around the area.

Q And how many employees is, say are at the [p. 578] main pumping, is that a large company or a small company?

A I think about 60. Fifty or sixty persons.

Q Do you all have the employees say work out of the same building, aside from the management, the employees?

A Yes.

Q You work in the same building?

A Yes.

Q Okay, and what hours do you work?

A I work a rotating shift and I work this week from 4:30 until 12:30.

A Oh there are various shifts at the place?

A Yes.

Q On your shift on any particular night how many employees would you say are working, 20 or 30?

A Not that many.

Q Approximately how many?

A I would say about 15, if everybody is there.

Q Okay, do you work, let's say a ratio of people, not sort of – do you work with Mexicans and Blacks and other nationalities?

A Yes sir, I have worked with them.

Q And you have been there approximately two years?

[p. 579] A Three years and a couple of months.

Q What position did you start off with?

A Clean up.

Q Clean up, and did you apply for the mechanics helper or did you say –

A I got promoted.

Q You got promoted into it?

A Yes.

Q Do you enjoy your work?

A Yes.

Q Is the job, is it a job to you?

A Yes.

Q You went to San Jack College and you studied science, right?

A Well, yes sir.

Q Okay, how did you develop an interest in Science or what is your interest in Science?

A Well, I started out basically starting, I got into Science from high school. That was – I was taking it.

Q Was that because you were in Florida and the water is all so blue?

A That is one of the reasons.

Q You won't find that here, not if you go to Galveston. You say that nobody in your family [p. 580] has been a victim of a crime. You have never been a victim of a crime?

A Not myself.

Q What are your feelings, say, on the crime situation in Harris County and in the nation in general? What is your feelings on that? Have you thought about it a lot?

A Oh, it is pretty bad.

Q In the sense that – and how did you, say, form your opinion, maybe the newspaper, news media, what you see or read on the television?

A Basically, what I read and hear on T.V. and see on T.V.

Q Okay, do you enjoye [sic] any type of hobbies? Do you do anything when you get off work?

A Skin diving, camping, stuff like that.

Q You get away on the weekends and things like that?

A Whenever I can.

Q Do you travel with a group of fellow boyfriends or girlfriends?

A A group of people.

Q Have you ran down the rapids at, say, Braunsfeld?

A I have done that a bunch of times.

[p. 581] Q By your answers to your information on whether or not you served on the jury, you answered no, right, no criminal or civil jury?

A Right.

Q And you have never, say, nobody has been a victim of a crime, this whole experience is rather new to you, would you say?

A It is new.

Q What was your first reaction, say, when you received your notice to appear in Court? What was your first reaction to that?

A Oh, it personally didn't bother me, but after fighting the traffic this morning, it got on my nerves a little bit. I didn't like the Houston traffic.

Q Did you ever think at any time you might be called to serve for a jury?

A Yes, I have.

Q What was your first reaction, say, when you found out the type of case you would be considered as a juror on was a capital murder case?

A You mean this morning?

Q Yes. What was your reaction?

A Kind of shocked and surprised.

[p. 582] Q And that shock or that surprise, was it because of the type of crime it was or did you, say, expect, say, something different?

A I expected something different.

Q And what did you expect differently, a lesser serious crime?

A Yes.

Q Okay, did you hope that you could be selected to a lesser serious crime?

A Sort of, yes and no.

Q Let me ask this question, first. Did you expect when you received your notice to appear in Court that you might be called down to say, sit on a capital murder case?

A No, I did not.

Q Did you ever consider that?

A No.

Q Were you in any way, say, apprehensive when you found out that you would have to sit on a capital murder case?

A No, I wasn't.

Q Mr. Graham, tell me what your feelings and views on capital punishment, and when I say capital

punishment, I am saying the decision that you would have to make, along with other [p. 583] jurors, if you were selected, the decision that, say, me as an individual, Dennis Graham, would have to one day sit down and determine or make a decision on whether somebody should live or die, how do you weigh that in your mind?

A Well, the way I feel, if it is really a serious crime in which it needs capital punishment, I would, after hearing the evidence and everything, I would make up my mind.

Q Okay, did you ever form a view on capital punishment before you came down here you, say, had taken a view on capital punishment before you came down here, right, on the death penalty when somebody was receiving the death penalty?

A What do you mean?

Q Had you made up your mind one way or the other, were you for or against the death penalty before you came down here?

A Yes, I made up my mind, basically, it involves in what the crime is about.

Q And when you say you had decided that you were in favor of the death penalty, if I'm assuming [p. 584] that you have decided that, you were in favor, right, about your answer from the Judge, did you have any moral or conscientious scruples against it and you said that you did not?

A I'm in favor of the death penalty, yes.

Q When you formulated that opinion, had you considered or have you ever considered a situation where you would have to make that decision, not just thinking on it on the abstract, but thinking about it from the decision that if I had ever had to make that decision or if I was ever placed in a position where I would have to make that decision, do you follow what I am saying?

A I know what you are saying.

Q Can you answer that?

MR. HOBBS: I would object to that question as placing – calling for a conclusion based upon something –

MR. MOCK: Purely subjective.

THE COURT: Overruled. Restate your question, please, Mr. Thornton.

Q Mr. Graham, you have formulated an opinion on capital punishment or the death penalty before you came to Court today, right, you had [p. 585] already formed an opinion, right?

A Yes.

Q And by your answers to the Judge when he asked you if you had any moral or religious scruples against it, you answered no, you didn't. So I would assume that you were in favor of the death penalty before you came to Court today, am I right?

A You are right.

Q Okay, if formulating your opinion on whether or not or whether you were in favor of the death penalty, did you ever look at it from the standpoint of me, Dennis

Graham, having to sit in the jury box to actually make a decision on whether somebody shall live or die or did you look at it from the prospective of me, Dennis Graham, sittin [sic] at home reading the newspaper and reading about a very heinous crime and saying yes, that guy ought to get it?

A Well, it is really both ways. I thought about sitting over there and making a decision.

Q Okay?

A But, like I said, it depends on what the case was.

[p. 586] Q You would like or you would have to listen to the facts and the evidence in a particular case before you could, say, make a decision?

A Right, I would have to listen to it.

Q Have you ever had the opportunity of, say, maybe sitting at home watching either television or reading the newspaper and just run across a very heinous crime, say, a mass murder where all the victims had their heads decapitated and all portions of their body was strewn over everywhere, have you ever had to sit down and if you saw that on T.V., and say, I think that person ought to get it?

A Yes, I have.

Q Okay, did you do that or looking at it now, did you do that with the understanding that there might be possible mitigations, mitigating factors and I say mitigating factors, I mean factors that might lessen your decision to give life or death, okay, did you ever consider that and what I am asking you is, is your belief on the death

penalty and whether somebody should live or die, purely emotional position? Does it come within just because of the nature of the crime [p. 587] or does it come in because maybe you think that it is a deterrent to crime, it will prevent somebody else from doing this?

A Well, it goes both ways.

Q Explain that a little bit more, explain your feelings both ways?

A As a deterrent to crime, I figure yes, we would have the death penalty, and as to the other way around, as far as emotions, it would play a part.

Q Okay, have you ever held the opinion that the death penalty is a deterrent to crime?

A Yes.

Q Have you ever had that view?

A In more severe cases, yes.

Q In more severe cases. Do you believe that some murders are more sever [sic] than other murders?

A Yes, I do.

Q Do you feel that – strike that. The Judge has taken some time to explain to you and the prosecution has taken some time to explain to you the special issues we have on the board. Special issue number one, two and three. Did you understand those fully? Did you understand those fully?

[p. 588] A Yes, I understand them.

Q Did you understand the rational behind those issues?

A Yes, I do.

Q Did you know that previously the Supreme Court of the United States has struck down the death penalty and at one time the death penalty was in effect, and then it was not and now it is in effect again?

A Yes, I do.

Q And that the reasoning and if I fall out of line on the reasons, Your Honor, please correct me. On the issues of yes, we have the issues is to give potential jurors some direction in making a decision on whether somebody should live or die. Do you understand that?

A I understand that.

Q That you won't be making in the jury box and having found beyond a reasonable doubt that a person did commit murder, you wouldn't be making in the jury box, giving a slip of paper to write life or death on there. For whatever reason why you wanted to just live or die. It is not like that.

[p. 589] A Yes, I know.

Q And the reason we have certain issues is to give each individual juror and the jurors as a whole some directions on how they should make that decision, okay?

A All right.

Q Does the fact that the law requires you, through the issues, to make a decision on life or death, does that in any way bother you, that the law designs the issues involved, that you have to look at those things?

A No, that won't bother me.

Q If emotion is involved in your decision, that is fine, okay, but if it requires you that you have to look at those things and answer each of those issues, does that cause you any problem?

A No, it doesn't.

Q When you formulated your decision and your opinion on the death penalty prior to coming here in Court today, had you considered whether or not a person would be a continuing threat to society when you, say, if you had to make that decision, was that one of your considerations?

[p. 590] A No, not really.

Q Okay, when you formulated your decision on the death penalty, what things besides the nature of the crime would you consider or would you like to consider before you made the decision of life or death? Let's take it out. The crime has been committed. It is a murder. We know that. Okay. Would that be all you need before you can make a decision of life or death?

MR. HOBBS: Objection, Your Honor, as an improper question, phrased the way it is.

THE COURT: Overruled.

Q Would you like me to repeat it?

A Yes.

MR. THORNTON: Your Honor, I would like the court reporter to read back that last question.

THE COURT: I will restate it. The question, Mr. Graham, is this. Would the fact of the crime be the only

thing that you would consider in whether or not to assess the death penalty or would you consider something other than the facts of the crime, itself, in [p. 591] determining the death penalty?

A It would have to be other facts.

Q Beg your pardon?

A Other facts.

Q The facts of the case?

A Yes, the facts of the case.

Q That would be the basis or that is what you would use as a criteria that you would use to determine life or death, the facts of the case?

A Yes.

Q Okay, when you are saying the facts of the case, are you saying what happened on that particular date when the State has to prove that on May 13, 1981, the defendant, Gary Graham, committed murder in the course of committing a theft, is that what you are saying, you would have to know before you could reach a decision in the case, what happened on that day?

A Yes, that is true.

Q Is that all you would have to know, what happened on that day?

A The reason behind it and stuff.

Q I beg your pardon.

[p. 592] A The reason behind it.

Q The reason behind it, okay, anything else?

A Well, it could have been an accidental shooting or something.

Q Okay, anything else?

A No.

Q Okay, remember, I took you back and asked you have you ever been in a situation where you read in the newspaper or T.V. and you read about a crime and I asked you if you ever had to make the decision, look at it from the prospective, if I had to make the decision to give them life or death, right?

A Right.

Q Would you say your belief, then, prior to you coming to trial on the death penalty and how you would decide on giving a person life or death, would you say your beliefs are the same as they were then as they are now?

A Yes, they are.

Q Okay, and that the facts of the case and what happened would be what you would require on making the decision of life and death, am I right?

A Right.

[p. 593] Q The facts of the case, what happened, what was the reason behind it, am I right?

A Right.

Q Did you understand fully the special issue number one, two and three as explained to you by the Judge?

A Yes, I did.

Q And did you understand fully special issues number one, two and three as explained to you by the prosecution?

A Yes, I did.

Q Okay, sir.

MR. THORNTON: Your Honor, at this time I would like to challenge this juror for cause.

THE COURT: Mr. Graham, we have spoken with you at length about these special issues that you would have to answer on the punishment phase of the trial. We talked about special issue number one, at least with regard to deliberately and reasonable expectation. And we also spoke with you at length about the fact that the State must prove to you beyond a reasonable doubt that you should answer these special issues yes. We also spoke with [p. 594] you about the fact that there may be other testimony that you might hear with regard to the issue number two as to whether or not the defendant would probably commit criminal acts of violence that would constitute a continuing threat to society. You, in my speaking with you, told me that you would not automatically vote for the death penalty just on the facts of the crime, but that you would require the State to carry its burden on these other special issues with regard to whether or not the defendant had any prior criminal record and committed other criminal acts, that your decision would not he [sic] automatically, is that what you are telling me is the case, sir, that you would require the State to present other testimony or other evidence to convince

you beyond a reasonable doubt that you should answer these special issues yes?

A That is what I am saying.

THE COURT: So I want to make sure I understand. The fact, the mere fact you have found someone guilty of capital murder, that in itself, are you going to automatically vote for the death penalty regardless of the [p. 595] situation?

A No, I am not.

THE COURT: Your challenge is denied.

MR. THORNTON: We have no further questions.

THE COURT: What says the State?

MR. HOBBS: The State will accept.

THE COURT: What says the defense, Mr. Thornton?

MR. THORNTON: The defense will accept, Your Honor.

THE COURT: All right, Mr. Graham, will you raise your hand and be sworn as a juror, please sir.

(At this time juror sworn as a juror.)

THE COURT: All right, Mr. Graham, this will complete your service at this time. We anticipate that the jury selection process will take a total of approximately two weeks, this week and the next week. We anticipate the testimony will start on approximately the 26th of October, and will last approximately a week. We anticipate the total trial will take about a week to take place.

You are free [p. 596] to go to your work, where ever you are going to be, and we will notify you in advance as to when the trial is going to begin. My courtroom is on the fourth floor in this building, and that is where this trial will be held. We have phone numbers as to where you can be reached, and we have a home phone number for you. Do you have a business phone number?

A Yes.

THE COURT: What is that number?

A 471-654 [sic].

THE COURT: And your home number is here?

A Yes.

THE COURT: All right sir, If any of these numbers change or if you need to contact us, you may contact Mr. Pollinger, who will be in charge of the jury in this proceeding. As I have stated, we will contact you hopefully two or three days, the middle of next week to assure you we will be beginning on Monday the 26th and let you have advance notice. Do you need any written verification for your employer to show you have been down [p. 597] here?

A No.

THE COURT: We will be in contact with you. Thank you. You are excused.

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[p. 757] MS. MEREDITH MONTAGUE, called as a prospective juror,-after having first been duly sworn, testified as follows:

EXAMINATION BY THE COURT

Q Ms. Montague, you are unique in that you are the only woman that I have come in contact with who both husband and wife are physicians other than my wife's sister and her husband. She's a gynecologist and he is a pediatrician, so it is a unique combination.

Ms. Montague, it's been a day since we spoke about principles applying to a criminal case, and I want to talk to you briefly before we begin our discussions today. I know from your juror information form that you had prior civil service, so I'm sure you are familiar to an extent with the trial of a case. Possibly, you are not familiar with the trial of a criminal case. We discussed many principles that apply in the trial of a criminal case. Presumption of innocence, burden of proof, the fact that the indictment is no evidence of guilt, the right of the defendant to remain silent or the Defense to present no testimony. [p. 758] The fact that we have a bifurcated or two step trial system in Texas. These are all things I have discussed with you. Did any of the topics that I discussed yesterday present any problems to you as far as your understanding as to what they meant and your ability to follow those concepts, if I instructed you as to these concepts?

Q No, Your Honor.

Q By virtue of the fact that this is a capital murder case, it entails, as I told you yesterday, the allegations that a person's life was taken while the accused was in the course of committing another felony offense. And in this particular case, the defendant, Gary Graham, as I told you yesterday, is accused of taking the life of Bobby Grant Lambert while Mr. Graham was in the course of committing robbery. By virtue of the fact that it is a capital murder case, it presents the twelve persons that will serve as jurors in this case with the dilemma of examining their feelings with regard to the death penalty as a possibility for punishment. Once again, this is the only situation in which a jury can contemplate taking [p. 759] another person's life as punishment, but it is incumbent upon all of us to speak with you about your feelings about the death penalty and that is why I told you yesterday that you give it some thought prior to our speaking to you individually. We are not in any way attempting to pry into your personal feelings, but it is obvious that we need to know your feelings with regard to the death penalty. Obviously, as a physician, you have a great regard for human life, but our law requires that I ask you if you have any conscientious, religious or moral scruples against the imposition of the death penalty as punishment in a case that you determine proper.

A No, I have no scruples.

Q I take it, then, what you are telling me – would you feel more comfortable if I said Doctor Montague?

A It doesn't matter.

Q That if you were to serve on the jury in this or any other capital murder case, if the State proved to you

beyond a reasonable doubt that the defendant should be found guilty, you could vote guilty, knowing full well the dilemma that [p. 760] your verdict would create for you on the punishment phase of the trial? As I said yesterday, in the punishment phase of a capital murder case, the jury has only two possible answers on the punishment phase. Those answers mandate the Court to assess punishment at either life in the Texas Department of Corrections or death by lethal injection. I do not have the discretion to alter or reverse the jury's verdict. If the jury answers two special issues that are submitted to them yes, the assessment of punishment would be death by lethal injection. I cannot contravene that verdict and say I believe the punishment should be life. And the reverse is true also. The jury communicates its wishes to the Court as to what the proper punishment should be assessed by the way they answer at least two special issues that are included in the Court's charge.

By virtue of your prior jury service on the civil case, I know you are familiar with the concept of special issues. As I have stated, they are included in the Court's charge. One of the two special issues deals with the Court directing that you review once again the [p. 761] defendant's conduct to answer a special issue. The specific special issue deals with the Court asking you to consider certain items of evidence and make a decision as to whether or not the defendant will probably commit future acts of violence that will constitute a continuing threat to society. The State has the burden of proof on the punishment phase of proving to you beyond a reasonable doubt if it is seeking the death penalty, that the answer to those special issues should be yes. And an array of yes answers –

by the unanimous verdict, once again, results in the punishment being assessed at death. A no answer to one or more or all special issues results in the punishment of life imprisonment. The State has the burden of proof, as I said, of beyond a reasonable doubt on both phases of the trial. What we are looking for in the persons who are chosen as jurors in this case are twelve people who will not be predisposed as to how they would answer those special issues. We cannot have twelve people who automatically vote for the death penalty merely because the taking of another human being's life is involved. [p. 762] Obviously, there are many murder cases that are presented in this Courthouse that do not have the alternative of death, the death penalty as the type of punishment. That because of the second felony situation that we have talked about involving the taking of a life of another human being, that creates the capital murder situation, and thereby creates the situation of death.

In every phase of a capital murder case, the jury will have to consider at least two special issues. There are always two, at least, and no more than three. There is a possibility that three special issues will be submitted to the jury. I would like to call your attention to the cardboards that are attached to the board and ask you to read special issues number one and number two, and then we will discuss them a little further.

In special issue number one we are obviously asking you to re-examine the conduct of the defendant that resulted in the death of the deceased in asking you two specific questions with regard to that conduct. One was the conduct of the defendant that resulted in the [p. 763]

death of the deceased done deliberately and in committing that conduct, did the defendant reasonably expect the death of the deceased would occur. I will not give you any legal definitions as to those terms. It is a matter of your using your common sense or what definitions you consider to be proper in analyzing this special issue. In my mind, the word deliberately means it is a person's intention or his conscious objective to commit that act. It is not necessarily equated with premeditation, but it is a voluntary act on that person's part. You may have a different definition that you go by. This is the way I construe deliberately in my mind.

And in viewing the defendant's conduct, did he reasonably expect that the death of the person he killed would occur. Once again, we are requiring that the persons who serve on this jury examine the evidence that has been presented to them before they answer any of these special issues. We are not people who have knee jerk response based on the fact that they have convicted a person of capital murder. In special issue number one, [p. 764] I think if we consider two hypothetical situations, it may draw a distinction for you as to how you may answer special issue number one. Assume with me that a person walks into a Utotem intending to rob the clerk at the Utotem Store, but not intending to harm anyone, and in walking into the store, the person takes the pistol and he does not intend to use the pistol other than as a means of force to take money, not to take a human life. As he walks into the store, he slips because there has been water left on the floor by the door that he did not see. As he slips, his feet fly out from beneath him, and the gun

leaves his hand and the gun leaves the hand and discharges and a bullet is discharged and hits the clerk in the chest and kills him. That's on the one hand. On the other hand, we have the same robber walking into the store, taking the money and guns down the clerk in cold-blood. In comparing the conduct of the defendant or the robbers in those two situations, your analysis as to how you might answer special issue number one may differ. In viewing the accidental discharge situation, you very well may say that [p. 765] even though that robber deliberately intended to go into the store and take the money, he did not deliberately intend to take, nor could he have reasonably expected if he was going to take the life of a store clerk. On the contrary, the hypothetical situation where the clerk is slain in cold-blood, you might view that conduct and say he acted deliberately and reasonably expected to take the clerk's life. There are varying situations that would require possible different answers by the jury. Do you agree with me, Ma'am, that in viewing special issue number one, you will examine the testimony that has been offered and not automatically answer these special issues because you have found the defendant guilty?

A Yes.

Q The second special issue requires that the jury, as effectively as possible, predict the future of the defendant. We are asking you whether or not there is a probability, is it more likely than not, that this person will commit criminal acts of violence in the future that would constitute a continuing threat to society. I will not give you a restriction in saying that [p. 766] you can only consider those acts if the person were walking the streets

of Houston, Texas. You very well might consider his acts if he was in the penitentiary as being a threat to other inmates or prison guards. Obviously that is part of society, also. But you obviously could consider the facts that were presented to you on the guilt or innocence phase of the trial in which you have found him guilty. You also may consider prior record, if any, other criminal offenses, if any, and reputation testimony, if any, as to what type of a person this is. On the contrary, the person may not have any prior criminal record. He may not have any other criminal offenses, and he may be a son of a minister, a person whom everyone agrees is a very good human being except for this one offense. So once again, we are asking that you have an open mind and not answer either special issue yes or no until all the testimony is presented. Could you do that?

A Yes.

Q You understand once again I will not be able to provide you with a definition of probability. [p.767] In my mind, probability means it is more likely than not to occur. It is not a certainty. The State of Texas could not prove to you beyond any doubt that it is a certainty that he will commit criminal acts of violence, but their burden is to prove to you beyond a reasonable doubt that he probably would commit criminal acts of violence. There will be no definition as to what criminal acts of violence is composed of. In our law, there is a broad spectrum, ranging from a Class C misdemeanor assault, where a person touches you in a manner you find offensive, and that person is in violation of a criminal law. That ranges on the one end of the spectrum to the other end, obviously, in which capital murder finds itself. There is a

broad range in between dealing with assaultive offenses, offenses against the person in the form of rape, kidnapping, robbery, and in property offenses dealing with property destruction in the form of criminal mischief. Someone will fully destroy property you own. That is an act of violence, and in viewing this special issue, you must make the determination whether or not the defendant would constitute [p. 768] a continuing threat or ongoing threat to society. Do you have any questions with regard to the explanation that I have given you in the first two special issues?

A No, Your Honor.

Q As I have stated, there possibly will be a third special issue, and that special is only presented in the event that it is raised by the evidence on the guilt or innocence phase of the trial. That special issue deals with the possibility of the person who has been killed in some way contributing to or provoking the situation in which his death resulted. That special also is attached to the bulletin board. As you can see, it begins by saying if raised by the evidence. If it is raised by the evidence, regardless of how minimal that evidence is, if it is one sentence that raises the issue of provocation by the person who was killed, I, as a matter of law, must present that special issue to the jury. If there is not a sentential of provocation by the deceased, then I will not present that to you. But, assuming that is presented to you, it will then become necessary for you to view the conduct of the [p. 769] two persons, the defendant and the deceased. And in viewing those persons' conduct, you will have to make a decision as to whether or not the defendant, in taking the life of the deceased, acted unreasonably in response to

provocation of some sort by the deceased, if any, prior to his death. This is not meant to provide justification for the taking of that person's life. A person who is convicted of capital murder cannot claim self-defense because he has provoked the initial difficulty. In my hypothetical situation dealing with the store clerk and the robber, the robber, by virtue of his entering the store with the gun to rob that clerk has provoked the difficulty. If he shoots the clerk after the clerk has drawn a gun from his drawer, he cannot, in turn, claim self-defense, but he can present testimony as to the clerk pulling a gun and firing at him for the issue of mitigation in special issue number three for the jury's consideration as to whether or not he should live or die. It is difficult to conjure up in my mind and possibly in your mind the feeling that the person who has been killed acted unreasonably in defending [p. 770] his property. However, once again, we are not impugning any criminal responsibility to the person that was killed. We are merely saying that if he in some way provoked the difficulty in response to what the defendant did. You may consider this testimony in mitigation that it may have some effect as to your decision as to whether or not the defendant must live or die. You may, hypothetically speaking, view a situation in which, once again, the robber has walked into a store only to take money and not to take a life. He takes the money and turns to walk out the door and the store clerk, in response to the robber, pulls the gun from under the counter, shoots and hits the defendant in the back and the defendant, as he falls to the floor, turns and fires and kills the store clerk out of an act of self-preservation. As you can see, if the robber had been allowed to walk on out the door, no one

would have been hurt or killed, but the shooting was brought about by the clerk pulling the gun from under the counter. Once again, we are not condoning what the defendant has done, we are merely saying that if you feel it is proper, you may consider [p. 771] this in mitigation of punishment. Do any of the items that I have talked about, Ms. Montague, present any problems for you?

A No.

Q Okay. All right, do you feel, Ma'am, that if you are chosen as a juror in this case, that you would have an open mind with regard to these special issues and not reach a verdict until all of the testimony by both sides, if any, was completed?

A Yes, Your Honor.

Q And that it is your statement to the Court that you would not automatically vote for the death penalty based upon the facts, merely upon the fact that a person's life was taken in this case?

A I would not.

Q Ms. Montague, do you have any questions of me as far as my explanation of these terms?

A No.

Q Now, I have concluded what I wish to speak with you about. Our law requires that the attorneys for both sides have an opportunity to speak with you. Mr. Hobbs, the Assistant District Attorney will speak to you first, and Mr. Mock, [p. 772] representing the defendant, Gary Graham, will speak with you. Mr. Hobbs, you may proceed.

EXAMINATION BY THE STATE

QUESTIONS BY MR. HOBBS:

Q Thank you, Your Honor. Good morning, Doctor Montague, As the Judge told you, my name is Carl Hobbs, and I am the Assistant District Attorney assigned to prosecute this case. The first thing I must ask you is that your daughter, I believe her name is Elaine?

A Eleanor.

Q Eleanor is – will be a full-fledged prosecutor in County Court 10 very soon . The mere fact your daughter is an Assistant District Attorney, would that in any way affect your decisions in this case, Ma'am, as a fair and impartial juror?

A No.

Q Of your children, are they all girls?

A One boy.

Q Under our law an individual at the age of seventeen is considered adult responsibility under the adult laws of our State. Would the mere age or youth of a defendant cause you to [p. 773] react differently under your oath as a juror in the decision of a case if you believe the State had proved its case to you beyond a reasonable doubt?

A No, it wouldn't.

Q Now, the minor theft that you were talking about on item twenty-four, asking if you had been a victim of a crime, was that a theft from –

A From a house.

Q Okay. Very long ago, Ma'am?

A About three years ago.

Q Would that in any way affect your decision in this type of case?

A No.

Q Doctor, in discussing basically the case, the trial is divided into two phases, which I think you are aware of, but needless to say, if the State had not proved its case beyond a reasonable doubt as to the first phase, the second phase is annulled. During that first phase, the State's burden as it is in the second phase is beyond a reasonable doubt, not beyond all doubt or beyond a shadow of a doubt, as you may have heard on television. That is a rather impossible [p. 774] burden from the standpoint you would almost have to have been present to see what had happened to remove all doubt from your mind. And if that were the case, you would be a witness and not a juror. That doesn't pose a problem for you?

A No.

Q What are those elements? Well, the State, in one thing, in that burden of proof, the Defense doesn't have to do a thing. I can't call the defendant to the stand. He doesn't have to testify. They don't have to put on any witnesses whatsoever. In that same context, the State does not, under the law, have to prove why an individual did what he or she may have done. It is proving that the event did take place beyond a reasonable doubt. What are those elements? Well it's, also in capital murder, we are going to be talking about the intentional taking of a life, in the first act, in combination with it, here we are going

to be talking about intentional taking of a life in conjunction with the robbery and the elements specifically in this case that you, as a potential juror, means that the State must prove [p. 775] that Gary Graham was, in fact, the individual that in Harris County, Texas, on or about May 13, 1981, did then and there unlawfully, while in the course of committing or attempting to commit the robbery of Bobby Grant Lambert, intentionally caused the death of Bobby Grant Lambert, by shooting Bobby Grant Lambert with a gun. That is all the State must prove beyond a reasonable doubt as to the first phase of the trial. Do you have any problems with that concept?

A No.

Q I can't go into a person's mind and tell you what they are thinking. So in showing intent, intentional will be defined for you by the Judge as a legal term. I can show you intent by a person's words or by his actions or a combination of one or the other. Do you have any problems with that concept?

A No.

Q Now, robbery, we are going to necessarily have to prove robbery, and I would like to read the definition of what robbery is under our law. A person commits the offense if in the course of committing theft of property with intent to [p. 776] obtain or maintain control of that property, a person intentionally, or knowingly or recklessly causes bodily injury to another or intentionally or knowingly threatens or places another in fear of imminent bodily injury or death, by use of a deadly weapon or serious bodily injury, it becomes aggravated robbery. Here, robbery in and of itself, I think it is in the course of

committing theft of property. The key word being in the course of. The charge that is here, that can be conduct that occurs in an attempt to commit it, during the commission of or in immediate flight after it. The offense of robbery can actually occur without any property whatsoever having been taken. If I come up to you and pull a gun on you, Doctor, and demand your money and a police officer came up behind me and stuck a gun in my back and stopped me, at that immediate time, I have actually committed the offense of aggravated robbery. No problem with that?

A No.

Q Okay, now I would like to give an example, a hypothetical for you to consider in my next question, and then let me get into the special [p. 777] issues, one, two and three. And the set of hypothetical situations I would like to give you is to imagine this room to be, let's say a Seven-Eleven Store, okay?

A Okay.

Q And that you are present in the store, in the back, and in a position similar to where you now – where Ms. Hamilton, the clerk, you can see her, you know she is there. You can see somebody maybe coming in, but maybe not as you are now, can see faces or give a good description of someone. Furthermore, besides yourself and Ms. Hamilton being present in this store, Mr. Mock is also present, and he is an area of the store similar to this jury box with an obstruction such as that rail that is here, okay.

Q He is sitting here and furthermore, besides the three of you, Mr. Thornton is also present in an area such as is here where he has the ability to see both, all three of the other people that are in the store. And I am going to be the individual, the robber. I come in and let us also, let's assume that Ms. Hamilton has just [p. 778] closed out the register. Okay?

A Okay.

Q And that she is at the end of her shift or whatever and has placed the money in a drop bag, and has a smock on and she has it sticking out partially from that smock, which I could see. And she is in that area of the store. You are where you are at. You can – you might see me or a shadow of me coming in. I approach and furthermore that she is holding some type of box in the process of restocking something. I approach Ms. Hamilton, and I start to grab for her pocket containing the drop bag. As I am doing that, she turns from me with the box. She is holding the box and she turns away from me and kind of pulls away and I am still grabbing at it. At that time, I grab hold of her with one hand and reach down and pull the pistol and bring it up towards her. At that time Mr. Mock sees the pistol and he is concentrating heavily on that pistol, not so much at me, but at that pistol. Exercising common sense and sees the pistol, he dives to the floor, doesn't get a good look at me. Mr. Thornton is out here. You can see a motion, but you don't see what is [p. 779] happening, and Mr. Thornton can see both my actions that of Ms. Hamilton, and also partially Mr. Mock over here. When I see Mr. Thornton and after I pull the gun I shoot and kill – shoot in the chest area of Ms. Hamilton and kill her, and run out and leave, okay?

A Okay.

Q I am caught later on. And I am being brought in to be tried for the offense of capital murder. Now, in the situation that is there of the three people that were in the store, the four people, Ms. Hamilton being the deceased, cannot testify. Mr. Mock didn't see me. He saw a weapon. You didn't see anything. Mr. Thornton takes the stand. He testifies and let us further presume that the State has proved its case to you beyond a reasonable doubt as to every element. We are looking at the element of whether or not I am the one that committed the offense. Furthermore, let us assume that they didn't get my gun. They didn't get anything that I may have taken, if I took anything, and I didn't leave any fingerprints, okay?

A Okay.

Q Mr. Thornton takes the stand. Now, I am going [p. 780] to take you out of the situation and put you in as a juror, okay?

A Okay.

Q Mr. Thornton testifies under oath and he testifies that Carl Hobbs is the person that shot and killed Ms. Hamilton on the day in question in Harris County, Texas, and all of the other elements. Could you, as a juror, if you believed beyond a reasonable doubt the State had proved each and every element, and furthermore, you believed the testimony of Mr. Thornton, could you base a conviction on the testimony of a single eyewitness?

A Yes.

Q Okay. Thank you. Now, let us presume that I had been found guilty now of the offense of capital murder

for the purposes of the discussion of the special issues, in using the example that I have given.

Special issue number one, the Judge has read to you, and that being whether or not the conduct of the defendant that caused the death of the deceased was committed deliberately and with reasonable expectation that the death of the deceased would result. The term [p. 781] deliberately, do you have – what is your definition of deliberately?

A I think an action that is taken with thought, and with certainty on the part of an individual.

Q Webster has defined it as willful or voluntary. Do you have a problem with that?

A No.

Q The concept of, you don't equate it with premeditation, or do you?

A No.

Q One's actions can be deliberate based upon little or no thought?

A Yes.

Q Now, with reasonable expectation that the death of the deceased would result as just a given factor, the mere wording of the way special issue number one is phrased requires one as a juror to examine the facts and circumstances of the offense, itself, in order that it can be answered at all and those facts and circumstances to make that distinction. In the situation and the example that I have given for you to consider there, would you

have a problem in answering that question in that type of [p. 782] hypothetical situation?

A No, sir.

Q Now, of course, there are going to be variations as to the set of facts that you hear in a given case, but using a judgment as you, as a juror and as a collective body as a jury, to decide these issues, if you believe beyond a reasonable doubt that the State had proved that that answer should be yes, could you so find and vote yes?

A Yes, sir.

Q Now, as to special issue number two, let me move down to it?

A Okay.

Q The issue, by its wording, and by its content, necessarily requires the consideration not only of the offense, itself, and the actions of the defendant and the parties involved, but also other evidence that the Court may determine relevant for the jury to hear as to this individual's probability of committing future acts of criminal violence that will constitute a continuing threat to society. That can be prior record, if any, other acts of criminal violence, if any, reputation as a possibility, [p. 783] one more or maybe none, but that is the facts that will unfold. Probability. Once again, not defined. Not absolutely. Not positively. Probability. Do you have a definition that readily comes to mind as far as you are concerned as to what probability is?

A It is something that cannot be stated in a statistical fence. For me, probability means that there is something between fifty percent and one hundred percent, possibility that it would occur.

Q Anything further that you would consider? Would you necessarily equate probability with being likely or more than likely or possible?

A Yes, possible.

Q Needless to say we are judging on a present criterion with what evidence may be presented to you as a juror to answer that question. Once again, if you believe beyond a reasonable doubt, through the evidence that was presented to you, the State had proved that special issue number two should be answered yes, could you vote yes, knowing that if there were special issue number one and number two were the only special issues submitted that that finding, that voting [p. 784] of yes on both of those issues, along with the other eleven members of the jury, would result in the death penalty being imposed by the Court?

A I could.

Q Regardless of the age of the individual being considered?

A Yes.

Q - Okay, now, needless to say, society, as the Judge said, takes in using in a very broad sense and do you have any quarrel with the concept that those individuals that are through our laws have been confined in the penal institutions and those that take care of them there, whether they be deputy sheriffs or prison guards or what

have you, are part of that society, and could you take that into consideration in making your determination of whether or not those criminal acts of violence could or would be directed toward those individuals as part of our society?

A Yes, sir.

Q Okay, now, criminal acts of violence. Do you have any problems with that concept?

A No.

[p. 785] Q In looking at what type of acts, not exactly a shoplifting, Ma'am, but Doctor, from the standpoint, you, as an individual, making a decision such as this, that you may be required to make, would you keep an open mind and look at that evidence? What type of things would you like to view if you had a choice of what you could view concerning special issue number two, what type of evidence either way?

A With regard to the individual reputation.

Q Thank you, Ma'am.

A Whether or not he was engaging in criminal acts prior to or during a particular phase in his life, and more, of course, than hearsay, one would expect to have as factual testimony as possible. I am not too sure that I understand what comes under the language term as criminal acts of violence. I think that I would need some information with regard to what is criminal in an individual's past and what isn't. I know the obvious ones, but I am sure that there are other technical factions that I am not aware of.

Q Criminal acts of violence can be as little as destroying property, all the way up to murder, [p. 786] robbery, rape.

A The major ones I think I know.

Q Now, special issue number three, and I'm about out of time. That is only if the evidence raises it. Now, in the situation that we are talking about, I think the key word is whether or not – it's reasonable – actions, is it – what, if anything, did the person that was killed do. Was it provocation? That's the first thing you have to decide in your mind, whether it was or it wasn't, and the, whether that provocation, in response to it, was reasonable. If it was unreasonable, it should be answered yes, and if was not reasonable, it was in fact, reasonable, it should be answered no. Do you have any problem with that?

A No.

THE COURT: Anything further Mr. Hobbs?

MR. HOBBS: We pass, Your Honor.

[p. 787] EXAMINATION BY THE DEFENSE

QUESTIONS BY MR. MOCK:

Q If it please the Court, Your Honor. Doctor Montague, what is your medical specialty?

A I'm in cancer treatment, with treatment of radiation.

Q Okay, now, I would take it that you don't have a private practice but that you practice through the hospital?

A Yes, that is right.

Q Do you have any way of determining what percentage of your patient load is terminal verses non-terminal?

A I think about forty percent can be considered uncontrolled. They might not be terminal, but there is uncontrolled tumor or cancer, but sixty percent are to be treated for the cancer.

Q You know, if – I always go to my doctor's office and I always say if I have a doctor in my office today, you are such a nice person, I can't do it to you anyway. How long have you been practicing medicine?

A Since 1953, but then I went to a resident's training program after medical school.

[p. 788] Q And how long have you lived in Houston?

A Since 1958.

Q How long have you lived on Yarwell?

A Since 1961.

Q What part of town is that in?

A In the southwest area, the Meyerland area.

Q Now, you have also indicated that your daughter and by Mr. Hobb's good research, is going to be working in County Court Number 10. She will be a full-time member of the staff of the D.A.'s Office.

A If she passes her bar exam, yes.

Q She's currently working now as an intern, I understand?

A That is right.

Q Her name is?

A The same, Eleanor Montague.

Q Okay, now, because she is now working with the District Attorney's Office and may possibly be a full-time employee of that staff, does that give you any kind of kindred spirit to the D.A.'s Office?

A That was the first thought that I had when I received the juror's notice, and I thought about it quite a bit. I think not, in answer to your [p. 789] question.

Q Now, I can appreciate your ability to say you think not, but at this stage of the game, we are just about at absolutes, Ma'am, where we have to have a positive answer that it would not really affect you.

A It would not.

Q And if you listen to the evidence and made a determination in your mind that Gary Graham was not guilty of the offense of capital murder, you could find him not guilty and not have to go home to your daughter with your head down?

A Oh, yes sir.

Q What is your husband's medical specialty?

A He is an internist.

Q He is in private practice?

A Yes, he is.

Q Now, you also indicated you are a New Yorker. How long did you live in New York, if at all?

A I lived in New York off and on for a total of five years.

Q Do you have any experiences as relates to New York City that relates to crime that may have stayed with you?

A I loved the city. I didn't have. No, sir. Not [p. 790] at all, because I love the city. If I didn't have children, I would live there.

Q Did you go to graduate school at the University of Alabama?

A No, that was undergraduate.

Q Where did you go?

A Medical school was in Philadelphia.

Q What school?

A Medical College of Pennsylvania.

Q And I noticed also you have indicated your religious preference as Unitarian. Which church do you attend?

A First Unitarian on South Main Street.

Q Is that the one on Main?

A It is between Main and Fannin.

Q On Southmore on the corner?

A Yes, on the corner.

Q The one with the chanting players?

A Yes, chanting players.

Q Now, other than the burglaries you have had at your house, have you been a victim of any other crimes?

A No, sir.

Q Has anyone in your immediate family or close associates to you been any victim of any [p. 791] violent crime to your knowledge?

A Several neighbors have had their homes broken into, but they were, what is it, burglarized, it was nothing else.

Q Now, we are talking about in this instance, Doctor Montague, the most serious offense on the statutes of the Texas Penal Code. It is capital murder. It means taking the life of somebody while you are doing some other act, be it robbery, kidnapping, rape, and arson. Is there anything about that fact that we are talking about capital murder that is so repugnant to you that you wouldn't be able to sit and be a fair and impartial juror and not be able to listen to the evidence of this kind of case?

A No, sir.

Q Also in these types of cases, this in the only situation where a defendant cannot waive or give up his right to a jury. We are mandated in this proceeding by the Code of Criminal Procedure, which tells us that we have a two trial system in the State of Texas, the guilt or

innocence and if you get past that phase, then you go to the punishment phase. You wouldn't hold it against the defendant, would you, Ma'am that we [p. 792] are talking about punishment now so much, are you, in thinking that we might be looking ahead to the punishment phase of the trial and get completely past the guilt or innocence phase of the trial? You realize we are only doing it because we are mandated by the Court and we are not saying Gary Graham is guilty?

A I understand.

Q You wouldn't hold that against him?

A No, sir.

Q Mr. Hobbs has also told you that the State has the burden. They must prove to you beyond a reasonable doubt each and every element of the offense as charged, that we don't have to do anything. Once they complete their testimony and put whatever testimony or witnesses, whatever it is, on the stand and rest, we can rest right behind them. We don't have to say word, and if they haven't proven to you at that point beyond a reasonable doubt that Gary Graham is guilty of the offense as charged, then you must return a verdict of not guilty. Toward that end, Gary Graham is also cloaked with a fifth amendment guarantee against self-incrimination, meaning he does not have to take the stand to testify in [p. 793] his behalf should we choose not to, and we can't tell you at this point whether we are going to, or any of our tactical decisions or anything at this point. But, the law says that if he does not testify that the jury cannot refer to, comment upon or allude to that fact nor hold it

as a circumstance against him. Could you follow that law?

A Yes.

Q Would you, Ma'am, possibly think that he must tell you his side of the story or he must be guilty?

A No.

Q Now, let's talk about, for a few minutes, the issues on the board. And you have discussed them briefly with Mr. Hobbs also, but I want to just chat with you for a second about special issue number one and how it is joined by the junction and, meaning it is a two-pronged situation, both of which must be met. Would you agree with me on that?

A Yes.

Q Can you also – strike that – would you consider an act that caused the death of someone automatically deliberately?

[p. 794] A No.

Q Can you see how someone might have formed one intent as in the Judge's hypothetical to go in to rob somebody and during the course of the robbery things change, and as an end result he may deliberately shoot somebody. Can you, Ma'am, conceive of a certain set of circumstances where one might deliberately shoot someone and not have a reasonable expectation that that person might die?

A I may have some trouble with that. He deliberately would shoot someone and expect them not to die?

Q And not have the expectation that they would die.

A Perhaps if they deliberately shot them in an area that would not be fatal.

Q Well, would you hold them, Ma'am, to the burden of knowing as you might technically, which areas of the body would be fatal, would you hold a layman to that knowledge or that burden of knowing what you would know as to what parts of the body might be fatal or not?

A I might, yes.

Q Are you telling us, then, Ma'am, that you might [p. 795] expect or you would expect a layman to know what areas of the body they might shoot in and not kill somebody?

MR. HOBBS: Objection, Your Honor, as being an improper question of this juror in relation to the issue posed.

MR. MOCK: If I may respond?

THE COURT: All right.

MR. MOCK: It's my position that in answering the question, the State still has the burden to the punishment issue to prove each and every element of the offense. I'm asking this witness or this possible juror if she would shift that burden and place a burden on the defendant, giving – requiring him to have knowledge that she might have as a professional doctor and impugn that knowledge or the burden of that knowledge to laymen.

THE COURT: Let me see if I can explain that a little further, Doctor. In viewing the conduct of the defendant, obviously you are viewing his conduct from his eyes. You cannot impugn knowledge to another person. If obviously as you stated that someone is shot in the foot or the shoulder or the arm to [p. 796] incapacitate them, but not to kill them, but it results in their death, to some unique reaction to some type of pain medicine or let's assume that the person falls to the floor after they are wounded and hits his head on the edge of the corner and is subsequently killed. You would obviously maybe possibly dealing with a certain situation as to reasonable expectation of the death, but what I would ask you is would you keep an open mind with regard to this issue and make a judgment from the facts as they are presented to you in trial?

A Yes. I think the thing that confused me a bit was the deliberate action of the individual, but could you understand where the deliberate action might not end up in the result of a fatality. I think I would certainly be able to keep an open mind.

THE COURT: Someone, very possibly, as Mr. Mock stated, chooses to enter the store to rob the store and chooses to shoot, but not to kill, nor reasonably expect to kill, and it would be just a matter of you using your personal knowledge and the law will require that you are not to consider any personal experiences, [p. 797] other than what are shown to you in trying to dissuade or persuade another juror from his or her point of view. With that instruction, your objection is sustained, Mr. Hobbs. I don't think any further discussion is necessary

on that point. You may proceed to something else, Mr. Mock.

QUESTIONS CONTINUING BY THE DEFENSE

QUESTIONS BY MR. MOCK:

Q Thank you, Your Honor. So, you are telling us, Ma'am, that you could conceive of the situation where a person could deliberately shoot somebody and not have a reasonable expectation that they not die?

A Yes.

Q Okay, let me ask you this. How would you determine, Ma'am, whether somebody did something deliberately or not in your own words?

A I would see if the actions, whatever it is, is a willful one, is one that they planned to carry out and is not accidental.

Q Would you be able to break these two – excuse me, I'm trying not to confuse you. Would you be able to break the special issue number one [p. 798] down into its two parts and look at each part to come up with the answer in the end result?

A The determinations – the determination of the death?

Q Yes Ma'am, would you do that?

A Yes, I think so.

Q Okay, that is all I can ask. Now, as to question number two, whether there is a probability that the defendant would commit criminal acts of violence that

would constitute a continuing threat to society, have you thought about those?

A Yes.

Q Have you thought about in your own mind, Ma'am, what you would like to have brought to you in order to help you make that determination?

A No, I haven't thought about it to that degree. I don't know with the exception of people who have known an individual over a long period of time or things on record, previous records, things of this sort, but aside from those two, right now, I wouldn't be able to think of any other things, other than dangerous actions and things of that sort.

Q Well now, would you automatically feel that [p. 799] because someone has committed one or more of the acts of criminal violence that they would automatically be a continuing threat to society?

A Not automatically, but I would say the chances would be greater than someone who might not have committed any acts of violence.

Q Okay, would you wait until you got to that special issue if you got that far before determining your answer to number two and analyze number two by itself, using the evidence, if any, which is presented on number two?

A Yes.

Q Before you made any decision? Would you?

A Yes.

Q Would you, Ma'am, share with me your feelings about the death penalty?

A About ten years ago I was opposed to it, and I felt rather strongly about it. I think as I got older, I began to change my mind, thinking that there are, in fact, certain crimes committed by certain people who probably ought to be punished by death – the death penalty, and I have had reversal of my mind. I certainly don't think that everybody that commits a [p. 800] violent crime or capital murder should have the death penalty, but I can see in some instances I would be in favor of it.

Q You mentioned that this feeling that you now express has evolved during a ten year period?

A I think so, yes.

Q And during this period, did you discuss your feelings with anybody or was it just something that evolved within your person?

A I think it was a personal decision on my part.

Q Well, did you study over it long or just something that kind of happened or just evolved?

A I think maybe it is the civilization and culture that we find ourselves in that probably prompted me to change my mind that there are, in fact, so many horrible things, not each from individual to individual, but from group to group that I have decided that, in fact, the death penalty may be – it's not a solution, but it may be one way to mete out punishment for certain crimes, and I can't tell you exactly when it was that I made that decision, but I have made it.

Q Yes, Ma'am. I can understand that. We are not here to hold you down to any bare specific [p. 801] statistical type date. Our real purpose is to try to get to know you in a very short period of time, to get a feel for what you feel. That is the only way we can do it, is to kind of ask you.

Question number three, if raised by the evidence, only if raised by the evidence will be a third issue to be answered. If that should happen, you would have three issues that you would have to consider, all three would have to be answered yes unanimously before a death penalty would be imposed by the Court. Does the fact that if these issues are answered yes and that is all you have to do in this case now, you know the end results, but all you have to do is answer yes, and the Court, not you, imposes the death penalty, does that, Ma'am, in any way lessen what might be an awesome burden on you?

A No, I don't think so.

Q You have no emotional feelings about the fact that the Court would do it and that you don't do it, so therefore, it takes some of it off of you, it takes a little bit away from you and makes it easier to do?

[p. 802] A Not in the sense that it should make the first decision any easier. I – I don't think that would help me make the decision any easier.

Q Okay. Do you know – now, the third question as everybody as said, is more of a troublesome question because we understand that a person committing an offense does not have the right to claim the defense or justification or self-defense. Can you, Ma'am, conceive of

a certain set of circumstances where, as in number three, the conduct of the defendant, in killing the deceased, was reasonable in light of the provocation that the – the provocation of the deceased?

A I think so.

Q Would the fact that a person may be protecting his own property as one has a right to do after one works for something and gets it, and the fact that a person, while protecting his property, is killed, although he may have provoked the killing, how does that square with you?

THE COURT: Rephrase your question, Mr. Mock, as to the last part of it, how does it square with you in relation to what?

[p. 803] Q I would ask you how does it square with her feelings about intent?

A If the deceased had done whatever actions in order to provoke someone who was going to rob him, I could see where there – where some circumstances, where a robber might have to act in some way. Am I getting close to what you are talking about?

Q Yes Ma'am, but I am not even trying to put the deceased person in the light of intentionally provoking someone, just protect – just responding to protecting his own property.

A Yes.

Q An example may be, let's say a fifteen – sixteen – seventeen year old kid going into a store and he is just as afraid as the man who owns the store is, but he needs the

money and wants the money and the only way he can get it, to his knowledge, is with a gun, because he knows nobody is going to give up the money voluntarily, so you have to have that force. He is there and he is shaking and scared and the man sees him and feels that he is scared, says what I have got here is a young punk. I'll fix him. And he reaches for something, we don't [p. 804] know whether he has got a gun or not. The person who is doing the robbery, never even sees a gun, but that reach may be enough to provoke the scared kid into reacting, and shooting. Can you envision a set of circumstances of something like that, that is what I am getting at.

MR. HOBBS: Objection, Your Honor.

A Yes, sir.

THE COURT: She has answered the question.

Q Doctor Montague, are you of the frame of mind now that if you were sitting in this chair over here, the same one Gary Graham was sitting in, that you would feel comfortable having a person of your convictions sitting on your jury?

MR. HOBBS: I would object as placing the witness in the chair of the defendant.

THE COURT: Sustained.

MR. MOCK: Your Honor, may I respond for the record? I was only asking her, Your Honor, as to her feeling of anything within her mind that might prevent her from being a fair and impartial juror. I was not trying to [p. 805] put her in the place of the defendant.

THE COURT: You may answer that question, Doctor Montague, is there anything that you know of that would prevent you or prohibit you from being a fair and impartial juror in this case?

A No.

THE COURT: Anything else, Mr. Mock?

MR. MOCK: No, Your Honor.

THE COURT: What says the State?

MR. HOBBS: May I have just a moment, Your Honor?

THE COURT: Yes, sir.

MR. HOBBS: The State will accept.

MR. MOCK: You can swear her, Judge.

THE COURT: Will you stand and be sworn and raise your right hand, Doctor Montague?

(At this time juror sworn as a juror)

THE COURT: Doctor Montague, we are, as you can see, in the middle of a long process to select a jury in this case. It is time consuming, however, we anticipate the jury selection will be completed by the end of next week. We hope and anticipate that the actual evidence in the trial of the case will begin on [p. 806] Monday, the 26th. You are free at this time to go back to your home or your work or elsewhere, and we will notify you as far in advance as possible as to the actual trial date. It probably will be in the middle part of next week we will begin that. We have your home and business phone numbers, and

Mr. Pollinger, who is serving as the Bailiff, in this particular proceeding, will be notifying you at the middle part of next week to inform you definitely as to when we will begin. We will have the trial in my Courtroom which is on the fourth floor of this building. The trial will not be up here. It will be in the Courtroom. With that, you are excused. Thank you very much.

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[p. 879] MR. DONALD G. ONDRUCH, called as a prospective juror, after having first been duly sworn, testified as follows:

EXAMINATION BY THE COURT

Q You are Mr. Donald Ondruch?

A Yes, sir.

Q All right, sir, Mr. Ondruch, by virtue of your being number one on the panel, obviously we are not giving you much time to think about what your feelings are, but obviously, we have to speak to somebody first, and you drew the black ball. I have covered quite a bit of information about the trial of a criminal case, however, I know you are one of the individuals who has had prior civil and criminal jury service, so I know much of what I have spoken about you have heard before in your other jury service. And I noticed in looking at your individual form you say that the case that you served as a juror on approximately 4 years ago was a criminal shooting case. Was that a capital murder case?

A No. That 4 years may be incorrect. It may be [p. 880] a little more than 4 years.

Q Is there anything I have talked about in the preliminary discussion about the trial of a criminal case or the constitutional safeguards that apply that you have any questions about?

A No.

Q All right, sir. As I have stated, Mr. Ondruch, we are very much concerned about one dominating issue

with regard to people who serve as jurors in this case, and that is the individual feelings of 12 people who serve on this jury with regard to the issue of capital punishment. Have you had an occasion, Mr. Ondruch, in your adult years or in the past to get some feeling about – strike that, with regard to the issue of capital punishment as a means of punishment or as a type of punishment, have you ever thought about what your feelings are?

A Not really.

Q Let me ask you this: Do you think, sir, that you could take part in a jury verdict where the issue of capital punishment was the possibility?

A Yes, I can.

[p. 881] Q I take it, then, Mr. Ondruch, that by your answer you have no conscientious, religious or moral scruples against the imposition of the death penalty as a means of punishment in a case you felt was proper, is that right, sir?

A That is right.

Q Okay, since you have not served on a jury in a capital murder case, I want to take a little bit of time to explain to you how a jury makes the decision that it makes. The jury does not receive a blank piece of paper from the Judge that is slid under the door and the jury does not write down life or death. That is not the way it is done. I submit a charge to the jury as I am sure you are familiar with the Court's charge?

A Yes, sir.

Q In that charge, there are at least two special issues, and I know that by virtue of you having served on a civil jury, that you are familiar with the term, special issue. You have a leg up on quite a few of the people we have talked to because this is totally greek [sic] to them, but the special issues that are [p. 882] presented in a capital murder case are only presented on the punishment phase of the trial after an individual has been found guilty of capital murder, and by definition of capital murder as being the taking of a person's life while the accused is in the course of committing another felony offense. Do you understand that, sir?

A Yes, sir.

Q Hypothetically speaking, it may be a 7-Eleven killing where the clerk is robbed of money at gunpoint and then shot and killed?

A That is true.

Q That is what removes it from the realm of all other criminal homicides. In the presentation of the Court's charge to the jury, there are at least two special issues on the punishment phase of the trial. Those two special issues are attached to the bulletin board to your right. If you would take a moment to look at those and then we will speak about them a little further. Have you had a chance to look at it?

A Yes.

Q Assume, if you will, we are on the punishment [p. 883] phase of a capital murder case. You have found the defendant guilty of capital murder. You have said that

he has taken another person's life while in the course of committing another felony. Okay?

A Okay.

Q You are now on the punishment phase, and in reading this first special issue, I think it is obvious that we are asking you to reflect back on the testimony that you have heard in the first phase of the trial because we are asking you about the conduct in which the defendant took the life of the person that he killed. Okay, we are asking you two questions about that conduct. Number one, did he do it deliberately and number two, did he reasonably expect that he was going to kill the person that he killed. I think you can look at that and see those are the key words we are talking about, okay?

A Okay.

Q There is a little bit of difference on the second phase of the trial from the first phase, and I am sure you know this from having served on a criminal jury. Certain terms are [p. 884] defined in a Court's charge, like intent is defined. Another – other words are defined in the Court's charge. In the theft case, theft is defined for you. Property is defined. There are certain legal definitions from the punishment phase. I will not give you a definition as to deliberately. I will not give you a definition as to reasonable expectation. We will call on you to use your common sense. I can give you some thoughts that I have about what these terms mean, and you can use your individual feelings one way or the other, whether it means the same to you or something different. In my mind when someone does something deliberately, it

means he intended to do that. It was his conscious objective to do what he did. It doesn't necessarily mean that by doing something deliberately you planned out or premeditated that act, but for instance if you reach around and deliberately pull a cup from this water fountain and fill it with water and drink it, someone could say you did that deliberately with your intention to do it. It was your conscious objective. It does not [p. 885] mean that you thought about it for three hours before you turned around and did it. Secondly, we are faced with the decision in reviewing the defendant's conduct as to whether or not when he took the life of the deceased, and you found him guilty of taking the life of the deceased, whether or not he reasonably expected that the death of the deceased would occur. Did he have a reasonable expectation that when he did what he did that that person was going to die. And I think I can draw two hypothetical situations that may cause you to see the distinction. Let me say this up front before we go further. We do not want anyone on the jury who has their minds made up as to these special issues before they heard whatever testimony is presented on them. We do not want anyone who feels like that, and if you feel this way, tell us now, that if you say, well, if you take another person's life well, your life ought to be taken too, because that obviously does not apply in this situation. There is other testimony that you should hear before you make your mind up. That is not to say that we would in any way [p. 886] criticize your feelings or disagree with you. It is just we can not have people that feel that way. We have to have people that can say I will only make the decision with regard to whether or not the death penalty

should be imposed after all the testimony is in and then I will decide. Do you understand that, sir?

A Yes.

Q Okay, let me give you these two hypothetical situations to show you where I see a distinction in deliberately and reasonable expectation. Assume we are talking about a 7-Eleven situation we were talking about. A person walks in with a pistol. He is a very small person, so if he walked up to the clerk without a weapon and asked for money, the clerk wouldn't want to give him any money. So he has to have some type of force to get the money he wants. He needs the money because he has a sick baby at home and there is no other way to get the money. So he goes in the store fully intending to use the pistol to get money from the clerk, but never intending that anybody be hurt by that. [p. 887] His sole objective when he goes in there is to get money and not hurt anybody. He walks into the store and as he walks into the store, someone has left water on the floor and as he walks in, he slips on the water on the floor and his feet flies out from under him, and the pistol hits the deck, a bullet is discharged accidentally from the pistol and the store clerk is hit with the bullet and dies. In viewing that situation, you may look at that and say well, that person went in the store to commit an aggravated robbery, and it resulted in the death of that person so that person is guilty of the offense of capital murder. That, now I have to decide if he should get the death penalty or not. In reviewing that, you may say – you very likely may say no, I don't think he reasonably expected that he was going to kill that person that day. He expected to rob him, but didn't expect to kill him, so you very well might

answer that issue when asked about his conduct and that he reasonably expected to kill that clerk, you may say no, he didn't reasonably expect to kill him. And [p. 888] let me give you these other instructions. There is no secrecy in the jury's verdict with regard to them personally knowing what the result of their verdict is. If you serve on a jury, this jury, and you answer these special issues yes, uniformly all of them are answered yes, you are going to know individually and as a jury that the defendant is going to get the death penalty because I don't have any way to change your answers. The law does not allow me to impose punishment that I deem to be proper. This is the only situation that a defendant has no alternative but to go to the jury for punishment, and if there is a unanimous yes answer by all 12 people as is required by law to be answered yes, all 12 must believe it should be yes, it is not like it was in the civil case where you can answer one of those special issues by 10 – 2 yes or no. A yes answer requires a unanimous verdict by all 12 people, and the State of Texas has the same burden of proof of proving to you beyond a reasonable doubt that the answers should be yes, just as it had the burden of proving to you that you [p. 889] should find him guilty, and to prove both phases of the trial to you beyond a reasonable doubt. Do you understand that, sir?

A Yes.

Q A no answer with regard to the jury goes back to a 10-2 system that you used in the civil case. If the jury feels that no, he did not reasonably expect to kill the deceased and 10 of you feel that way, then they can answer it no. If 6 of you feel yes and 6 of you feel no, then

they have to continue in their deliberations. It has to be a unanimous yes or 10-2 for no, okay?

A Okay.

Q Let's assume another hypothetical situation on the first special issue. The same person goes in to rob that store clerk. He robs the store clerk and for no reason guns him down in cold blood – cold blooded killing. You look at that situation and you say well, in that situation I think the guy deliberately embarked upon that conduct that resulted in the person's death, and then he reasonably expected to kill the person. You very well might answer that yes because you have the [p. 890] cold blooded killing. Whereas, in the other one, you have more of an accidental situation. So you see how those distinctions could vary and that is why I say it is so important that we have people with an open mind. Do you understand?

A I understand.

Q If you would take a moment to look at number two. I think it is obvious to you in looking at that second special issue that we are asking you to, in a way, put on your crystal ball and predict the future. We are asking you whether there is a probability that the defendant would commit criminal acts of violence in the future that would constitute a continuing threat to society. The State can't prove to you beyond a shadow of a doubt if you put him back on the street he would commit another criminal act of violence that would be an ongoing continuing threat. Their burden is proving beyond a reasonable doubt, based on his past record, if he has a prior criminal record; based on other crimes he has committed, if he has committed other crimes; based on what other people say

about [p. 891] him that know him. They say he is a violent person or unlawful or not, a peaceful and law abiding person. You can consider all of that input and then reach your decision as to whether or not he is more likely than not to commit criminal acts of violence in the future. Okay?

A Okay.

Q Let me give you a little further discussion about the terms in number two. Whether there is a probability. In my mind, probability means its more likely than not, not that it is a lead pipe cinch he is going to do it or not, even that it is possible. To me, it is 51%, more than likely he is going to do it, but once again, it is your individual interpretation that he will commit criminal acts of violence in the future. Acts of violence does not require there be another capital murder that we are talking about. It can be from someone pushing you on the shoulder and you find that offensive. That is an act of violence. That is a Class C assault to the other end of the spectrum, which is capital murder. So you can see [p. 892] there is a broad field there in criminal acts of violence. That covers assault, robbery, rape, kidnapping, even criminal – the offense of violence against property. Someone steals a radio out of your car or truck. That is an act of violence. That is an act of criminal mischief. So, all these fall within that area of the criminal acts of violence, and would these acts of violence that the defendant would probably commit constitute a continuing threat to society, and the ongoing threat to society. A threat not only to the people out here on the street, if you put them back on the street, but if you put him in the penitentiary, would he be a continuing threat to those people in there. That is part of

our society, too. At least those two special issues would be presented on the punishment phase. Do you have any problem with that, sir?

A No.

Q There probably may be a third special issue and we can't say it definitely will be there or won't be there because we haven't heard the testimony, but there possibly may be a [p. 893] third special issue, and that deals with whether or not the person who was killed did anything to help provoke the situation that resulted in his death. Let me say a couple of things about this special issue. Number one, you would only receive this special issue in my charge if it is raised by the evidence. It doesn't mean there has to be 50 witnesses that testify that the deceased in some way provoked or helped provoke the defendant. If there is only one line of testimony, if the defendant or someone else were to testify and say well, that guy reached out to grab me or that guy pulled a pistol out from under the counter, if there is some way the deceased helped provoke the situation, then that issue has to go into the charge. Do you understand that, sir?

A Yes.

Q Let me go on further to say that we are not in any way excusing the actions of the defendant because you have found him guilty of capital murder. You are saying you are only going to get one of two punishments, and this is true, Mr. Ondruch, and when the [p. 894] defendant is found guilty of capital murder, he can only receive death by lethal injection or life in the penitentiary. There is no other option for the jury. If the jury answers all of these yes, he gets death, and if the jury answers one or

more of the issues no, it is life. He gets life and once again, I have no discretion to change your verdict. But we are not in any way saying that the defendant was right in taking that person's life, but what we are doing is asking you to evaluate the actions of the person that is killed to see if he in some way provoked the difficulty. A defendant in a capital murder case cannot claim self defense. The reason that he can't is because he has provoked the difficulty in the first place when he walked into that store with the pistol to rob that clerk. He started the ball rolling. He provoked the difficulty. In fact, the clerk pulled the pistol out from under the counter and he shoots and kills the clerk to stay alive, he can't claim well, I only shot him in self defense. He can't claim that. That is a legal justification for a killing. He [p. 895] can't do that. He can only say the clerk brought about his death and I wasn't going to kill him, but he brought it about because of something he did, and asking you, the jury, to consider what the clerk did because I'm asking you not to sentence me to the death penalty but to sentence me to life. And if you feel that the actions in the killing of the clerk were not unreasonable because of what the clerk did to provoke this and bring about his own death, then you would answer this question no and sentence me to life in the penitentiary. We are not excusing the defendant's conduct in any way. We are considering this if it is proper in your determinations as to whether or not he will get life or death. This special issue reads if you will take a second to read it. If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased. So the fact that the deceased was killed, that he in some way

possibly brought about some action to bring about his death. Let's go back to a situation [p. 896] that I was talking about where the defendant has walked in just to rob and not to kill. He takes the money and he has no inclination to hurt anybody else. He turns to walk away. The clerk pulls a pistol out from under the counter and shoots and hits the defendant in the back as he is walking from the store. As the defendant falls to the floor, he turns and fires at the clerk because he knows if he doesn't shoot him, the clerk is going to kill him. So he is acting in an act of self preservation. He can't claim self defense because he provoked the difficulty, but he is acting to preserve his life and if the clerk had not pulled the pistol out from under the counter, he would have not died because all the man wanted was money. He didn't want to kill him. So in viewing that situation, you might say I believe that the deceased helped provoke the situation by pulling that pistol out from under the counter. If he hadn't done that, he wouldn't have died. So I then have to view that conduct in light of the defendant's testimony and to say was the defendant unreasonable in taking the clerk's [p. 897] life or was he not unreasonable based on what that clerk did. You may answer that question I think he was unreasonable in killing that clerk or you may answer it no, I don't think it was unreasonable. I found him guilty and I'm answering no not to condone what he did, knowing that the man is going to get life and not death because of the fact that he didn't intend to kill that clerk. That clerk brought about his own death by pulling the pistol out from under the counter. Do you understand the distinction?

A Yes.

Q Is there anything we have talked about, sir, that is difficult for you to understand at this point?

A No.

Q You further understand on that first special issue, Mr. Ondruch, talking about deliberately and reasonably expecting the death, do you understand that there is a possibility that the person's intent may change. He may walk into the store, not intending to kill somebody, and because of the actions of the person who [p. 898] was robbing, say, the clerk pulling the pistol out of the counter, may result in that person being killed, and he may not have reasonably expected that the person was going to die when he walked into that store. So we have the accidental situation that I was talking about where the pistol falls to the floor and the bullet discharges, or we have the situation where he may have walked in just intending to rob and not to kill and things happen that changed the situation. Things change, see, that situation may apply to. Do you feel, Mr. Ondruch, could you have an open mind on all of these situations?

A Yes.

Q And you could hear all of the testimony before you make a decision to sentence the defendant to life or death after you found him guilty of capital murder, if you do?

A Yes.

Q Okay, this is all what I plan to talk to you about Mr. Ondruch. The lawyers now have a chance. Mr. Hobbs, the Assistant District Attorney and Mr. Mock or Thornton, for the defense.

[p. 899] EXAMINATION BY THE STATE

QUESTIONS BY MR. HOBBS:

Q Good morning, sir. I see that you have – your younger children, what are their ages, your daughter and son?

A The oldest boy is 19 and he is going to college, and I have – and the oldest daughter is 16. She is a junior in high school, and a younger daughter, she is in junior high, 7th grade, and a baby boy in the first grade.

Q Okay, now, the Judge has told you, in talking to you quite extensively about the rights of the defendant and what we are looking at here, and it is a serious matter, and we are going to ask you questions and not to try to confuse you, but to get your thoughts because your thoughts are what we want to hear, not any pat answers because we have to make our decision in representing our particular client, both myself and the defense as to if we feel that you can be a fair and impartial juror. Now, I would like to go over a few things. The Judge told you there are two phases to the [p. 900] trial. The first phase being guilt or innocence phase. Needless to say, if the defendant is not found guilty, there is no punishment phase, and the issue of life or death is not appropriate. I would like to talk to you about burden of proof. Remember, the Judge talked to you about that? It is not proof – the burden is beyond a reasonable doubt, not beyond all doubt or beyond a shadow of a doubt. If it was beyond all doubt I think you would agree, sir, you would have to have been present and saw what happened, and made your own decision on it to remove all doubt from your mind. If you are, in fact, in that position, you could not be

a juror. You would be a witness as to what had happened. Would you agree?

A I agree, sir.

Q The burden of proof doesn't mean motive. I don't have to prove why he did it. Did he do it and in what manner. Now, you, as a juror, in your prior jury service, you know that the Judge gives you the law. You have to apply the facts to the law. You determine what those facts are, and the jury's job is to [p. 901] resolve conflict. If there wasn't conflict, I can assure you, that we wouldn't be here. Just the mere fact that we are here, there is conflict?

A Right.

Q Now, looking at the elements of the offense, what the State must prove beyond a reasonable doubt. The Judge told you that is only the elements of the offense, nothing more. Now, here, that it was Gary Graham, the defendant; that it occurred in Harris County, Texas; that it was on or about May 13, 1981; that the defendant, Gary Graham, did then and there while in the course of committing or attempting to commit one or the other, the robbery of Bobby Grant Lambert, intentionally caused the death of Bobby Grant Lambert by shooting Bobby Grant Lambert with a gun. Do you have any problems with that? Those are the things we must prove beyond a reasonable doubt?

A No.

Q Now, we are looking at murder plus. Here, murder in the course of a robbery, aggravated robbery. Intentional. I can't show you what a person is thinking. I can't

go into their [p. 902] mind and pull it out and show it to you in my hand, but I think that, would you not agree, sir, that an individual's intent can be implied by his actions alone, by what he does or by his words alone, by what he says or by a combination of words and actions, to show what he meant to be doing. The Judge will define intent. We have to show that it was an intentional killing, not accidental, but on purpose, intentional. Not premeditation, no motive. Now, the key phrase is robbery, during the course of committing robbery. What is robbery. The legal definition, a person commits the offense if in the course of committing theft, a person, with intent to obtain and maintain control of the property, intentionally or knowingly or recklessly causes bodily injury to another or intentionally or knowingly threatens or places another in fear of imminent bodily injury or death, and if you use a deadly weapon or cause serious bodily injury, it is aggravated robbery, okay?

A Okay.

Q Now, in the course of, I would like for you to [p. 903] look at this, in the course of committing theft. That doesn't mean – I can commit the offense of robbery under our law without ever getting any property. As an example, I came up to you and I said, Mr. Ondruch, I want all your money, and I have got a pistol on you. A police officer comes up to me and puts a pistol to the back of my head. I haven't got a dime from you, haven't gotten anything, but I have committed the offense of aggravated robbery. Do you have any problems with that?

A No, sir.

Q It means in the course of committing theft it means conduct that occurred in an attempt to commit or in the commission of or in the immediate flight after the attempt. As an example, it can be in the commission of theft. You had a pen in your pocket. I could come up to you, not say anything, grab the pen, take it from you and start, and turn away. As you follow me, you touch me on the shoulder and say give me my pen back. I turn around and shoot you. I have committed aggravated robbery. Any problem?

A No problem.

[p. 904] Q Now, you understand our law an individual, when he reaches the age of 17 years is considered an adult for all purposes in the law. Needless to say, 17 is young, but our laws state that. Would the mere age of a defendant, if you believed beyond a reasonable doubt that the State had proved each and every element of the offense for which that individual may be charged, would that – the age of the individual cause you to disregard any testimony or treat that individual any differently than you would someone else?

A No.

Q You realize that it is the State's burden on both stages of the trial. The defendant doesn't have to do anything. The State can't call the defendant to the stand to testify?

A I understand.

Q Now, I want to give you an example that we can use in a discussion of this case as to both phases of the trial. There are two parts to the trial. Guilt or innocence

stage, and punishment phase, okay, and I want to use this example. Okay, we – let us preseume [sic] that this room is a 7-Eleven store, okay?

[p. 905] A Okay.

Q And that you are present in the store. Let me change that. That Mr. Orte here is where you are. He is present in the store. That the clerk, Ms. Hamilton, is behind the register, and she is present, and as you can see, you have a little problem seeing her?

A Yes.

Q Okay, the same situation, there is an obstruction. You can see part, but you can't see what is going on over there completely. Furthermore, let us further presume that Mr. Mock is sitting in the area where Mr. Orte is here, with an obstruction such as this between him and this area out here. Further, let us presume that Mr. Thornton is out in this area. He can see both Ms. Hamilton, Mr. Mock and Mr. Orte, in a position where you are at. I am going to be the perpetrator of the crime. Let us further presume that in the example that I am giving you that Ms. Hamilton is nearing the end of her shift, and that she has closed out the register and fixing to make a deposit. She has taken out the money and put the money in a bank drop bag and she [p. 906] has got a smock on and she sticks it in the pocket of the smock, and a little bit sticking up so you can see it, and I know what it is, and I can see there is something in it. Furthermore, that she has got it there and she is holding a box. She is restocking something in the shelves behind the cash register. I come into the store. I see her. I see the pouch. I walk up to her and I start to grab for it. She sees me and she is holding

the box as she has been stacking and she turns to get away from me, to pull away from me, my grasp. I pull a weapon, a pistol, a gun. Mr. Mock sees that gun. He exercises – he saw me, but he is concentrating on that gun, not my face. He hits the deck. He is hiding. As I would – Mr. Thornton sees me, and you are over here where Mr. Orte is. You hear some commotion, but you can't see what is going on, can't see me and can't see her. Mr. Thornton sees Mr. Mock hit the deck and he sees me and I pull – this time I pull the gun out and have it to the head of Hamilton, and he shouts at me. I turn and I see him, and I turn back and she has moved away from [p. 907] me, and I shoot and kill her and run out. I am later caught and brought to trial for capital murder, murder in the course of committing robbery. Okay. They didn't find any weapon on me, and I didn't leave any fingerprints, and they didn't get any fingerprints, if I took anything. Now, Mr. Thornton gets up to testify, and let us further presume that you are on the jury, and you have up to this point believed that the State has proved every element of the offense beyond a reasonable doubt. Mr. Thornton accepts the identify of me as being the person who did it. Now, Mr. Thornton gets up and says I saw Carl Hobbs on that day in Harris County shoot and kill Ms. Hamilton. That is him. If you believed Mr. Thornton's testimony beyond a reasonable doubt, could you, in that hypothetical situation, find me guilty of capital murder, the offense of capital murder, based upon the testimony of a single eye witness, Mr. Thornton, if you believed him beyond a reasonable doubt?

A Yes.

Q Okay, you can see, although there is only more [p. 908] than one person here, there is only one that is going to say who it was?

A Yes, sir.

Q Now, if the defendant has been found guilty, let us go into the special issues that we have here. Looking at special issue number one on the board again, whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with a reasonable expectation that the death of the deceased would result. As the Judge has told you deliberately is not going to be defined. It doesn't mean premeditation. I can tell you that. It doesn't mean accidentally. Webster defines it as being willful or voluntary. Do you have a definition that would be somewhat different than that, sir?

A No, sir.

Q Okay, looking at this particular question, just the way it is written, requires that you have to consider the facts of the case, the capital murder offense, in order to answer it, what, in the example, what did I do. Okay? How did I act? Did I do the act deliberately? Deliberately, I think, would you agree, in the [p. 909] statement that a deliberate act can be an act with just short thought, not an extended period of thought, whether or not I committed the act deliberately and with the reasonable expectation that the death of the deceased would occur. That would vary according to the circumstances that you, as a juror, will have to find. I think you can see in the example that I have there that probably may or may not be much of a problem for you to determine whether or not my actions was that there was a reasonable expectation that I was

going to kill her when I did. Do you have any problem with that, sir?

A No, sir.

Q Let us presume that you have answered this question. Now, we go on to the second special issue, and the Judge told you these two special issues will be in every case, every case of capital murder, if the defendant is found guilty. That second issue is whether or not there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. Once again, probability is not [p. 910] defined. It doesn't mean absolutely. I can feel rest assured in telling you that means likely, possibly. Do you have a definition, sir, that you feel comfortable with the word probability?

A As far as -

Q What does probability mean to you, sir?

A It is possible.

Q Now, in this phase, this particular question, I think that you would see that the actions of the individual in the offense for the capital murder that you just found will give you some idea in answering this question. Also during this phase of the trial, the punishment phase, the Court, at its discretion, can allow testimony for the benefit of the jury as to all elements that he deems relevant. Okay. That can include, but not have to, prior criminal record, if any, other acts of criminal violence, if any, reputation testimony may or may not be there. Could be something could be bad, to help the jury in deciding what is the probability, if any, that the defendant would

commit future acts of criminal violence. Do you have any problem [p. 911] with that, sir?

A No, sir.

Q Now, criminal acts of violence. The Judge has defined that from as little as taking a knife and scraping through the top of this banister. That is a criminal act of violence. Slash a tire. Break a window. Touch you. If you felt it was offensive, I have committed a criminal act of violence. It could be as little as that. It could be as much as a murder or aggravated robbery, rape, some definitely serious crime that nobody disagrees with, but it could be a [sic] little as these others. So when you are asking yourself the probability, whether or not you have to consider the small end as well as the large end. Would you agree with that, sir?

A Correct.

Q Now, going back up to special issue number one, reasonable expectation. You don't have any problems with that, do you?

A No.

Q No problem with the aspect of probability?

A No, sir.

Q Criminal acts is a threat to society, not that [p. 912] he is going to do it every day, but would it constitute that continuing threat in society is that broad scope from everyone walking around in the street to those in the penitentiary?

A Yes, sir.

Q Is it conceivable in your mind that certain types of persons can be a threat to even people confined by their actions, the guards that are maybe caring for the people in the penitentiary as a possibility? Would you agree or disagree with that concept, sir?

A Yes, sir.

Q Okay, special issue number three is raised only if raised by the evidence. It is a little bit more difficult, but really, not that hard. Now, it is not an excuse, and we are not looking for something to say, not all acts of an individual are going to be provocation, okay?

A Okay.

Q You have to decide what, if there was any, provocation just because the issue is there, you decide whether or not it was provocation and if it was provocation, it might not be in [p. 913] your mind, if there was, and if whatever that person that died, the person was killed, did something that the killer acted on or he did in return of this action by the party that was killed. Was it unreasonable. In the example that I gave you in the hypothetical, where I shot and killed Ms. Hamilton, after she turned from me and Mr. Thornton hollered at me, I just turned and shot her. If, in that example, and the Court deemed that to be a proper case for this issue to be submitted, then you would have to determine whether or not the actions of Ms. Hamilton was any provocation. Okay?

A Okay.

Q My response to that action of her, was it reasonable? Was shooting her a reasonable act on my part. If it

was unreasonable, the answer requires, and you believe beyond a reasonable coubt [sic], the answer should be yes. Now, my question to you, sir, definitely these two will be here. This one may not. Do you have any difficulty with that concept?

A No, sir.

Q Issues number one and two if it is one issue [p. 914] or two issues, you realize upon a finding of yes an answer of yes to both of those issues gives the Court no discretion. The Court will impose the death penalty. He will impose it. If either one is answered no, then life in prison. Would the fact if you believe beyond a reasonable doubt that the answer to special issues number one and two, and if three is submitted, to three, are yes, knowing that that yes answer, by unanimous verdict by the jury would result in the imposition of the death penalty by the Court, would that preclude you as an individual from voting yes, even if you believed it to be the proper answer?

A No.

Q Is there any reason, sir, that you feel that you could not be fair in this type of a case?

A No reason.

Q Okay, thank you very much. Pass.

THE COURT: Mr. Thornton, you may question the juror.

[p. 915] EXAMINATION BY THE DEFENSE

QUESTIONS BY MR. THORTON:

Q Good morning, Mr. Ondruch, my name is Chester Thornton, and I am defense counsel for the defendant in this case, Gary Graham, and it is now my opportunity to talk with you to be able to discuss your views on certain issues and to ask you questions and judge your responses in order to determine whether we can select 12 impartial jurors, and that is what we are trying to do, select 12 impartial jurors. My questions to you are going to be personal and they are going to be direct in a sense and I want you to be open and honest with me. My position is not to humiliate you or embarrass you about your beliefs, nor am I here to debate with you on how you feel about certain issues. My purpose is to find out your gut feelings on issues and your beliefs. I'm of the mind that my beliefs are my beliefs, and nobody can change by belief, and I don't mind telling anybody how I feel about my belief, and this is the attitude I would like for you to assume [p. 916] because I am trying to get your inner feelings and like I am saying, I am not trying to embarrass you in any way by any of my questions. I know that you have been on a criminal jury before, right?

A Correct, sir.

Q Were you able to reach a verdict, without telling me what the verdict was, were you able to reach a verdict?

A Yes, it took some time.

Q So, this process is really not new to you. You have been through this before, right?

A Yes, sir.

Q What was your response when you first received your jury summons?

A Just another duty to perform.

Q Just another jury duty that you were going to have to spend?

A That is right.

Q What was your response when you found out it was a capital murder case you were going to have to sit on?

A None.

Q No difficulty?

A No difficulty.

[p. 917] Q Did you feel any more of a burden in your responsibility as a juror when you found out it was a capital murder case instead of, say, just the aggravated robbery case you sat on before?

A No, sir.

Q I noticed you are an engineer for the State Department of Highways?

A It is engineering with highways and construction of highways and roadways.

Q What would your daily responsibility be? Describe to me a typical day for you?

A My typical day, I really work for the public, for the Highway Department and we have several jobs under

different residence engineers and I am just one of the managers in the engineering department for that particular area in construction. The roads, construction work, so forth, and so on.

Q Is your job an outside or inside job?

A It is both, outside and inside.

Q Do you have the opportunity to supervise any people?

A Yes, I have 4 people under my supervision.

Q Four people under your supervision?

[p. 918] A Yes, sir, it is in the surveying department.

Q Okay, do you enjoy what you are doing?

A Very much so.

Q Okay, seeing that you have served on a criminal jury before, do you understand the Judge's instructions about the presumption of innocence and the burden of proof, you have been explained that today, and prior to today on your other jury service, is that right?

A That is correct.

Q You don't have any problems understanding that and weighing the possibility that you might have to sit in judgment of a person's life, life or death?

A No.

Q No problems with that?

A No problems whatsoever.

Q Do you think that might change the way you feel about the burden of beyond a reasonable doubt because the fact that a person's life hinges on your decision? Would that alter your perception of what is reasonable and what is not reasonable?

A No problem.

Q Okay, was there anything about that prior jury [p. 919] experience that might leave a bad taste in your mouth, that might affect you on how you might deliberate in this particular case?

A None whatsoever.

Q Okay, and you understand about what is evidence and what is facts and what is not evidence and what is not facts, right?

A Correct, sir.

Q The only evidence that is pertinent to this trial is what is heard from the witness stand, right?

A Correct.

Q What you might hear on the street is not pertinent to the trial that you potentially will be sitting on, okay?

A I understand that.

Q All right, there is a couple of things I want to go through with you. The State, through Mr. Hobbs, raised a hypothetical situation to you where the one eye witness testimony and he said where he entered the store and pulled a gun on Ms. Hamilton and shot her and Mr. Mock had ducked down and he couldn't see, Mr. Orte couldn't

get a good view and I was the only one that actually saw you. Going back [p. 920] to this hypothetical, that particular hypothetical, and he asked you your feelings on one eye witness, and could you return a conviction or a guilty verdict if you believed beyond a reasonable doubt that eye witness testimony, okay, that is the hypothetical I am dealing with. Would the fact that a defendant or a person is charged with or who is found to be guilty of capital murder and who faces a mandatory prison – mandatory punishment of either life or death, would that change the way you would want to weigh that eye witnesses' testimony or how would that affect you in your deliberations of that one eye witness testimony because of the fact that a capital punishment is a possibility?

A I have no feeling.

Q You would be able to weight it regardless?

A Yes.

Q Okay, could you tell me basically your views on capital punishment, and the death sentence?

A Well, this is my first – if I ever become a juror on this case, it will be my first case I have been on a murder case where the shooting case would be the same thing, and [p. 921] someone has to serve as a juror and I don't mind serving, and try to be impartial to all aspects as far as giving the burden of proof and this and that.

Q Tell me your feelings on the death penalty. The possibility that someone could die for their actions, what is your basic feelings on the death penalty, just explain to me?

A There is really no feelings, just depending on the case.

Q I'm saying, but, you have established in your mind that if you were to sit on a jury that you could return a death penalty, right?

A Very possibly, yes.

Q You don't, by your response to the Judge, you have no conscientious or religious or moral scruples against the infliction of the death penalty in a proper case?

A No, sir.

Q Okay, have you held those beliefs for a long time? Have you ever been in a position where you, say, I don't believe in capital punishment, I don't believe in taking ones life in return for him taking another person's life?

A I can't recall being in that position.

[p. 922] Q Okay, have you ever weighed it in that vein, the possibility or the taking of ones life because of the actions of another in taking ones life?

A Yes.

Q Have you ever looked at it from the prospective that the death sentence or the death penalty would be a deterrent to crime in any way that if we can start issuing out more sever [sic] punishment as the death penalty, maybe that would prevent somebody else from doing what somebody else did? Have you ever held that belief in that manner?

A Never have.

Q Okay, do you think that the death penalty is a deterrent to crime?

A Is what?

Q Do you believe that the death penalty is a deterrent to crime, that it would, say, maybe prevent or stop somebody else from doing the some later actions or for killing somebody else by trying rob a store or something?

A It just depends on the case and everything, really.

Q I am asking you to just assume, just your [p. 923] general feelings on the death penalty as it applies to society in a criminal justice system, okay, and that is the prospective I want you to look at. I am not asking you to speak - to speculate on the particular case. We are now outside the realm of the courtroom. I'm not asking you to place yourself in a position of a juror at this particular time, okay? I'm asking you, Mr. Ondruch, how do you feel, okay, about the death penalty. I'm sure you have heard it being debated?

A Yes, I have.

Q In the newspapers and probably television programs, and that is what I am trying to get your understanding of, if you were at home and you were looking at a program about the death penalty, and after the program was over with the commentator, if he was in your living room and asked you how you feel, that is what I want to know?

A You mean as far as the death penalty is concerned?

Q Right?

A Well, my feelings is that I don't like the [p. 924] death penalty to some extent, but if there is reasonable – reasons to have the death penalty for the particular case, I will go along with the death penalty.

Q Okay. What would you say would be a reason, would it be the type of crime that it would be committed that you would consider the death penalty or would it be just the, say, the actions of the individual or just your emotions of how you felt?

A Depends on the actions of the case.

Q Okay, would it make a difference, say, you would apply the death penalty in certain cases, in certain types of cases and that is different, I mean that is different from cases because really, without thinking when you say cases, I'm thinking about the facts of the case and now I'm just talking about the facts of the crime, rape, murder, robbery, have you ever placed in the prospective, I think they ought to get the death penalty for this and not for this and maybe this and this too, have you ever thought about it in that vein?

A I haven't, like I say, this is my first case, if I ever get on it would be something to think [p. 925] about.

Q Okay, going to issue number one and I'll return to that, do you have any problems – strike that – did you understand fully issue number one, you don't have any problems with it?

A No.

Q Would you have any problems reconciling issue number one after you have already found beyond a reasonable doubt that the defendant did and was guilty of

capital murder, okay, because those issues only come into play once a person has been found guilty?

A Right.

Q And is there any problem with you reconciling in your mind issue number one after you have already found that a person has been guilty of capital murder, he has been found beyond a reasonable doubt in your mind that the has been guilty of capital murder, you have voted that he is guilty. Going down to issue number one, would the mere fact you voted guilty, voted that the defendant was guilty in the guilt or the innocence stage make you automatically vote yes to issue number one? [p. 926] I want you to look at it and look at it from the prospective that you have already found him guilty. Would that automatically make you think that he did deliberately cause the death of the deceased, the fact that you have already voted him guilty?

A You are saying as far as capital punishment?

Q No, I am saying as far as special issue number one?

A Yes.

Q Are you saying by the mere fact – strike that – Mr. Ondruch, the Judge has explained to you the issues, right?

A Right.

Q Special issue number one, did you understand that fully?

A Yes.

Q Would you be able to look at that in the prior evidence that you heard at the previous guilt or innocence part, would you be able to look at that objectively and view this question without the help of, say, the assistance that you already found him guilty, would you be able to do it?

A Yes.

[p. 927] Q You would be able to answer this question because you had already found him guilty?

A Right.

Q Special issue number two, take a look at that one.

A Okay.

Q You would agree with me that that is in the sense something you would have to predict, right?

A Right.

Q And would the fact that the defendant faces a possibility of life or death in any way cause you problems in trying to predict the future, and I am saying, what I am asking you there is you have already found him guilty beyond a reasonable doubt, okay?

A Yes.

Q The question, comes now whether there will be life or whether there will be death, okay?

A Okay.

Q What would you like to know in order to answer special issue number two, what type of information would you like to have?

A From, say from the defendant's side?

Q From anybody's side, what would you like to [p. 928] know to answer special issue number two?

A Well, the trial will determine what kind of individual he is to that extent.

Q How do you weigh in your mind, what type of individual a person is, how do you judge people?

A It would – could be anybody, by actions.

Q Would it make a difference to you what somebody else thought about the individual?

A It may make a difference.

Q Would the fact that he might have been in trouble before help you in reaching a decision on that?

A Yes.

Q Would that be the only thing you would want to know, whether he had been in trouble before?

A It just depends, really.

Q Okay, look at special issue number three. Does that cause you any problems?

A No, sir.

Q Well, okay, would it affect your deliberations in special issue number three?

A No.

Q Can you think of a situation, and I am not asking you to give us a hypothetical situation, [p. 929] I'm asking can you think of a situation where it might be possible that the conduct of the defendant in killing the deceased, you have already found him guilty beyond a reasonable doubt, can you think of a situation where the conduct of the defendant, in killing the deceased was reasonable in response to the provocation, that he could be reasonable?

A If it comes out in the case, I would.

Q Okay, so you can think of a situation if it comes out in the case?

A Yes.

MR. THORTON: No further questions, Your Honor.

THE COURT: What says the State, Mr. Hobbs?

MR. HOBBS: The State will accept.

MR. THORNTON: The defense will accept.

THE COURT: Mr. Ondruch, will you stand and raise your right hand to be sworn as a juror. May I have the clerk's file, Mr. Pollinger?

(At this time the juror sworn by the Court.)

[p. 930] THE COURT: Mr. Ondruch, this will conclude your service at the present time. As I told you, we are in the middle of a long ardent process. You can see we have to go through this with every individual juror we speak with. We hope and anticipate that we will complete the jury selection by the end of next week. We

are anticipating beginning the actual testimony in the trial on or about the 26th of October. We anticipate that the total testimony will take maybe a week. We hope the trial should take more than a week. We have some phone numbers for your home and your work that you can be reached at. Is this your number?

A I have a field office number.

THE COURT: Would you write that down?

A This is in the field. Now this is my main office and you want to talk to Betty Nigruff. Just ask for her name. This gets the reception and you call her name and explain to her what you want, and my field office, if somebody wants to call there is 923-4680.

THE COURT: Okay. Mr. Pollinger, [p. 931] who brought you over in the panel this morning, will be contacting you by the middle of next week to let you know when we will be starting testimony in the case. As I say, we anticipate it will be on or about the 26th, but we will contact you before that. Thank you very much.

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[p. 995] MR. HUGH R. KILLGORE, called as a prospective juror, after having first been duly sworn, testified as follows:

EXAMINATION BY THE COURT

Q Good afternnon [sic], Mr. Killgore. Mr. Killgore, it has been a long while since we have spoke together as a group this morning. I know in looking at your juror information form that you have not had prior jury service, either civil or criminal. I want to make sure that you understand the principles that I talked about this morning, and you agreed with the principles we talked about. Did any of them present any difficulty for you?

A No, sir.

Q And if you would keep your voice up, this lady is recording what you say. Mr. Killgore, I want to spend a little bit of time talking with you this afternoon about the nature of the situation that we are talking about with regard to the fact that this is a capital murder case. It is necessary, obviously, as I told you this morning, we must make inquiries of you with regard to your feelings [p. 996] on that issue. Initially, let me ask you this: Do you have any conscientious, religious or moral scruples against the imposition of the death penalty as a means of punishment in a case that you would deem proper for it?

A No, not if it is proper.

Q Obviously, it is not a proper punishment for every case. Obviously, it is not a proper punishment for every capital murder case, but what you are telling me,

then, sir, is that you have no conscientious or religious or moral scruples against the imposition of the death penalty as punishment in a case that you would deem it to be proper, is that right, sir?

A Yes, sir.

Q I want to spend some time, Mr. Killgore, the nature in which a jury deliberates upon the verdict in the punishment phase of a capital murder trial. As we said this morning, the burden of proof is on the State on both phases of the trial. The State must prove to you beyond a reasonable doubt that the defendant is guilty of the crime he is charged [p. 997] with committing, and they must also prove that the death penalty is the proper punishment in the case. The defense has no burden whatsoever. Do you understand and agree with that?

A Yes, sir.

Q The jury communicates its verdict to the Judge by the way they answer special issues that are submitted to it by the Judge. I do not send to the jury room a blank piece of paper and have the jury write down life or death. It is not done that way. In every capital murder case in which they have returned a guilty verdict and the jury deliberates on a punishment phase of the trial, there are at least two special issues that are submitted to the jury, and the verdict is determined by the way the jury answers the special issues. Before we discuss the special issues, let me tell you this, they are answered by an answer of yes or no. If the jury unanimously says the answer should be yes to those questions, possibly three questions, the death penalty is their verdict. If they answer no to one or more of the special [p. 998] issues, a

life sentence is the punishment. But only two alternatives for punishment with the person who is found guilty of capital murder. Either life in the penitentiary or death by lethal injection. A yes answer by a jury requires a unanimous verdict, all 12 must agree. A no answer to either of the special issues by the jury requires a vote of 10 or more, so if 10 people agree that there should be a no answer to one or more of the special issues, that is sufficient to answer the issue no. A no answer to any of the special issues, once again, causes me to sentence the defendant to life in the Texas Department of Corrections. I have no discretion. I cannot change the jury's verdict. If the jury says by their answers the defendant should receive the death penalty, I cannot turn around and say I disagree. I would give him life, I can't. And the contrary is true, also. I can't change it from life to death if the jury feels he should receive life. There is no veil of mystery understanding that the jury says what the verdict is. They know by the [p. 999] way they answer those special issues what the outcome will be. As I stated, there are at least two special issues and possibly three. I would ask you if you would, sir, to turn to your right there and there are the first two special issues or the ones we are concerned with right now. If you would take some time to look at those, please?

A Okay.

Q Do you have any questions about either of those first two, about what they say?

A The first one has to do with the death penalty.

Q I'll explain these to you a little bit. The first special issue we are asking you whether the conduct of

the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would occur. Obviously, we are asking you to reconsider testimony that you heard on the guilt or innocence phase of the trial, and for you to decide two things about that testimony that you found him guilty of killing a person whom they killed, that you found him guilty of killing. We are asking you two things. [p. 1000] Number one, when he started on that conduct that resulted in the death of the deceased, number one, did he do it deliberately. Okay, and number two, did he reasonably expect that the person who had been killed would be killed. Do you understand that?

A Yes, sir.

Q Let me give you a couple of examples that may make this a little more clear. We are asking you, number one, did you do it deliberately, the killing deliberately and two, did he reasonably expect that the deceased would die. Assume that someone walks into the liquor store, I know you went to Jones High School, let's assume it is out in the east end. I went to Austin. A person walks in a liquor store and he is short of cash, has a sick wife and baby at home, and doesn't have any money, and he knows he is not going to get any money unless he takes some type of force along with him, because nobody is going to give him any money, and he has to have it. He goes in the store, fulling [sic] expecting to take money, but not that anybody is going to be hurt. He walks in the store, and someone [p. 1001] has left some water by the front door on the floor. He slips on that water on the floor and his feet fly out from under him. The pistol flies out

from his hand and the gun hits the floor and accidentally discharges and low and behold the clerk behind the counter is hit and killed. He intended to rob, but not to hurt anybody. You might view that situation and say I know when he went into the store to rob it he did that deliberately. He would not deliberately intend to kill the clerk nor would the state of mind that he went in there to rob could he reasonably have expected that he was going to kill anybody because he went in there to rob, not to kill. So you see, in viewing that situation, if that was the fact situation that would consider, you might well answer that no, you do not find that he did it deliberately or the death of the person deliberately and reasonably expected that person's death, you may say no to that. On the contrary, let's assume that we are viewing the situation where a person walks up and takes money from the clerk and guns [p. 1002] him down in cold blood, cold blooded situation. You in another situation might answer that yes, yes he did it deliberately and yes he reasonably expected to kill that person. There are different fact situations that would create different answers in the way you answer special issue number one.

A I understand now.

Q One thing I want you to understand is we have to have 12 people who can go into the punishment phase with an open mind. We can't have 12 people who say well, if he has killed somebody, I am going to vote for the death penalty, no matter what the facts are on the punishment phase of the trial. Obviously, if that is the way you felt, it wouldn't make any difference what you felt on the punishment phase of the trial, being good or bad. What we want are 12 people who will go in with an open mind

and if they are convinced beyond a reasonable doubt on the punishment phase the answers should be yes to these issues, then vote yes, and sentence the defendant to death, but on the contrary, if they are not convinced beyond a reasonable [p. 1003] doubt that the answers should be yes, then to vote no and make sure he gets life in the penitentiary instead. Do you think, sir, if you were to serve as a juror, you could go into that phase of the trial with an open mind?

A I think I could. I'm not sure.

Q Obviously, I can't ask you what your feelings would be one way or the other because you do not know any of the facts in the case, but I want to make sure that if you were a juror and you did reach the punishment phase of the trial, you have found a person guilty of capital murder, and you would still follow the oath tha you were sworn to uphold and that is to a true verdict render, according to the facts and the law that is presented to you. That means that you are not to formulate your verdict until all the testimony and evidence is presented to you. Could you agree to do that, sir?

A I don't know if I could at this time because if a man took another man's life and the Bible says an eye for an eye and a tooth for a tooth, so whether he committed it on purpose [p. 1004] or premeditated or accidentally, the man is still dead.

Q Yes, sir. Do you feel, sir, that if that were the situation, if you were convinced beyond a reasonable doubt that he did take another man's life, do you think that you would vote for the death penalty automatically?

A I don't know. I don't know which way I would vote at this time.

Q What you are telling me, sir, and I want to make sure I understand, obviously, we all feel it is wrong to take another person's life, and that there is a difference between taking a person's life as you serve as a juror and taking a person's life if you murder somebody. There is a difference, at least in some people's minds. What we must be assured of is that even if you serve as a juror and find the defendant guilty of capital murder, you do not walk out in the courtroom before you have heard any evidence on the punishment phase and, once again, we haven't gone through what you get on punishment, what you hear on the punishment phase of the trial, we haven't gone that far. We have gone through [p. 1005] the first special issue, but obviously, you can see in some situations, it may be the situation I have talked about where the man walks in to rob and slips on the water and the gun goes off accidentally, he is still guilty of capital murder because he intended to commit a felony which is the offense of robbery and the killing occurred as a result of the act he committed. That would still fall within the province of special issue number one and you might view that differently than you would the cold blooded killing with regard to whether or not you thought a person should get the death penalty or life in the penitentiary, or is that true, would you feel that way, sir?

A No, I would probably feel that way, depending on what the circumstances were.

Q And you don't know what the circumstances are?

A No.

Q Okay, there are aiso other situations when you talk about deliberately and reasonable expectations of death. Assume that we have got a situation where the person goes in a store and robs but not to kill and things [p. 1006] change. You know, the reasonable expectation, he didn't reasonably expect to kill somebody, but the circumstances change. The clerk may have pulled out a pistol from under the counter and fired at him and he fired back. There are all types of situations that present themselves, do you understand? By the same token, there may be a situation where a defendant may have shot a person in the foot and not reasonably expected that person to die and shot him in the foot to just stop him for some reason. Let's assume after he shoots the clerk in the foot, the clerk falls and hits his head on the side of the counter and dies from that. He is still criminally responsible for that. You might view that differently when you say that reasonable expectation that death would occur. If you shoot somebody in the foot, that doesn't mean they are going to die at any time. Do you see the difference in the fact situation I am talking about?

A Yes.

Q In talking about the terms deliberately and reasonable expectation, I think it is obvious [p. 1007] that deliberately does not necessarily mean premeditated. It means that, in my mind anyway, it is a person's conscious objective or intention to do something, but it doesn't mean that it is something he has thought out hours in advance. Would you agree with me, sir?

A Yes sir, in a different state of mind.

Q Premeditation, in my mind at least, possibly yours, requires a more thought out pattern than deliberately requires. Another point I want to make, Mr. Killgore, is the fact that I will not be giving you any legal definition with regard to the terms of any of these special issues. You would just be using your common sense. It is different than on the guilt or innocence phase where I will give you legal definitions as to some of the words that are included in the language of the indictment. The second special issue that is on the board deals with the future of the defendant, and we are asking you to make a prediction based on the evidence that you have heard in the guilt or innocence phase of the trial which you have found the [p. 1008] defendant guilty and if it is proper from other testimony that you might hear about the past criminal record of the defendant, if any, of other criminal offenses he may have committed, possibly what other people in the community may say about him; because we are asking you questions, we – will the defendant probably commit criminal acts of violence in the future that would constitute a continuing threat to society, you know if he goes back out on the street or even put in the penitentiary where he is around other people, we still call it a society, would he probably commit criminal acts of violence that constitute an ongoing threat to society. Probability, obviously, does not mean a certainty, and it does not mean that he 100% would do it. The State must prove to you beyond a reasonable doubt that he probably will, it is more likely than not that he will. And criminal acts of violence, obviously, have a broad range of consideration. If someone were to trip you as you walk down

the hallway, that is a criminal act of violence. It is punishable by two hundred dollar fine. It is [p. 1009] a Class C misdemeanor. If you find the fact they tripped you offensive, that is one end of the spectrum of seriousness and the other end, obviously, is the offense of capital murder, and there is a broad area in between, dealing with assault, rape, robberies, crimes against a person, crimes of violence against property. Someone pours paint on the hood of your car to the extent you have to have it repainted, that is an act of criminal mischief, to its broader area there, and is this person a risk to the extent that he will be an ongoing or continuing threat to society. Do you have any problem understanding these two issues?

A Well, would his past be brought up or not or violent acts?

Q If he had, that is obviously something you would want to consider. If he had a prior criminal record, that would be presented to you. If he had committed other acts of violence, that can be presented to you. On the contrary, if he had never done anything wrong in his life, was just the model of the perfect citizen, and just had this one [p. 1010] horrible episode in his life and had 20 people from the community saying he is a wonderful person, because he wants you to have everything that the law allows you to have in reaching this decision. We want it to be as intelligent a decision as possible. Do you have any trouble understanding those issues?

A No, sir.

Q As I say, at least two, the first two issues will be there. The third issue is more troublesome and I ask if

you will spend some time looking at that and we will talk a little bit more. The first thing I want to point out about that number three is that – that it is only presented to the jury if it is raised by the evidence. I mean if it is raised by the evidence. That means if there is some testimony, even if it is just one line of testimony about a person who was killed in some way contributing to or provoking or helping to provoke the situation. Let's assume that we have got a person going in to the store to rob and not to kill, and he turns to walk out, and not having hurt anyone and the store owner pulls a pistol out from [p. 1011] under the counter and fires and shoots the robber in the back as he is leaving the store, and then the robber turns around and fires out of self preservation and shoots the clerk and the clerk dies. That is not to say we are in any way blaming the clerk for the fact he was killed. We are not even saying he did anything wrong. Obviously, you have a right to defend your property, but what the law is asking you to consider, the fact in this situation is in the matter of determining whether or not the defendant should live or die. He went into a situation not possibly – not intending to kill anyone, but the person that he killed helped bring about the killing. Then you are to consider that if it is raised by the evidence to assist you in determining whether or not you want this defendant to live or die. Once again, we are not condoning the fact that the defendant has taken somebody's life. We are merely presenting this to you for you to decide whether or not it, in your mind, means that he should receive life in the penitentiary as opposed to death. The first two we ask [p. 1012] you to keep an open mind, but the special issue reads whether the defendant's conduct in taking the life

of a person that he killed was unreasonable in light of provocation provided by the deceased, if any, that resulted in his death.

A Yes, sir.

Q So we have got the clerk who pulls the pistol out from under the counter, who has not been harmed in any way. We are not blaming them for pulling the pistol out from under the counter. We are saying Mr. Clerk, if you hadn't pulled the pistol out you would still be alive. He kind of provoked the defendant. He wasn't going to be hurt, and then he pulled out the pistol and he kind of helped provoke the situation by doing it. We are not blaming him, but once again, we are not saying it is, but if raised by the evidence, we want you to know about it, so you can determine whether or not you think the answer should be yes or no, and that will result in the man's life being taken or the defendant being given the death penalty or life. Do you see the significance of this [p. 1013] issue, sir?

A I don't see how you can come to a correct answer on that unless you had a witness if this man is the only man left, he is the only person.

Q Obviously, there has to be another witness. You know, you have got the defendant and we have talked about his having the right not to testify against himself. We have the store clerk, who is dead. You know, obviously, the State can't present any type of case of any sort unless there was at least one other person involved that saw it happen, so if there was only testimony about the provocation by the clerk, it would have to come from one of two sources, either the defendant taking the stand and

testifying or another witness that saw the incident take place testifying there was some type of provocation by the clerk. Do you understand how this could happen?

A Yes, sir.

Q Could you keep an open mind with regard to all of these special issues?

A I think I could.

[p. 1014] Q All right, sir, now once again, depending on the fact situation, you might very well say yes, I think the defendant was unreasonable in killing the deceased because the deceased didn't provoke him in any way. Let's go back to the example the clerk standing there emptyhanded and the defendant gunned him down in cold blood. He didn't provoke anything. You would answer that yes, yes his conduct was unreasonable, because the deceased didn't do anything to provoke him. On the other hand, the situation where I'm talking about where the clerk is alone and he pulls a pistol from the counter, you might view that differently and might say no, as far as it seems to me to say that the defendant's conduct was not unreasonable, you are not blaming the clerk in any way for what you are saying is that he did in some way provoke or add to the situation, and your answer to that issue will be yes or no. Do you understand that?

A Yes, sir.

Q Is there anything we have talked about up to now that you do not understand and I need to [p. 1015] spend some more time discussing with you?

A No.

Q Both the lawyers for the defendant and for the State will have a chance to talk to you now. I have finished taking the time I wanted to talk to you. Mr. Hobbs and then Mr. Thornton for the defendant will have a chance to talk to you. Okay, Mr. Hobbs?

EXAMINATION BY THE STATE

QUESTIONS BY MR. HOBBS:

Q Thank you, Your Honor. Good afternoon, Mr. Killgore. My name is Carl Hobbs, as the Judge told you and I am the Assistant District Attorney assigned to prosecute in this case. Seated in back of me is Mr. Mike Addudel, who may be assisting from time to time. This is Ms. Northcutt, a law student, who is working in our office as part of her school work. Okay. What I would talk to you about, the Judge has told you there are two parts to the trial, and needless to say the first part being guilt or innocence. If the defendant is not found guilty, if he is found not guilty, then we don't even have to worry about [p. 1016] punishment, so the first part I'm going to be talking about is what the State has to prove to you because the defendant doesn't have to do anything. He can sit there if he wishes. Now, the burden of proof is beyond a reasonable doubt. The Judge told you that doesn't mean beyond all doubt or beyond a shadow of a doubt. I think you would agree if it was beyond all doubt in your mind, that you would have actually have to have been present and saw what happened, and then if you were in that position, you would be a witness and not a juror. Do you have any problems with that?

A No, sir.

Q There is conflict. If there weren't conflict, we wouldn't be here in this courtroom. I think you can see that?

A Yes.

Q Your job as a juror is to resolve conflict, to decide what the facts are, how much you want to believe of a witnesses' testimony, whether you want to believe all of it, part of it or none of it. Further, we are going to be talking about what does the State have to prove beyond a reasonable doubt. It is the [p. 1017] elements of the offense. Those and only those elements, and what are they? Okay, they are set out in the indictment. Basically, these are the things. These are the things that the State must prove. These and only these: That it was the defendant, Gary Graham; that it was – that it occurred in Harris County, Texas; that it was on or about May 13, 1981. It doesn't have to be exactly that day. Could be before, could be after, but on or about. That then and there, unlawfully while in the course of committing or attempting to commit, either one, the robbery of Bobby Grant Lambert intentionally caused the death of Bobby Grant Lambert by shooting Bobby Grant Lambert with a gun. That is what we have to prove to you beyond a reasonable doubt. Now, what is robbery. Robbery is defined as a person who commits an offense if in the course of committing theft and with the intent to obtain and maintain control of the property intentionally or knowingly or recklessly causes bodily injury to another intentionally or knowingly or recklessly causes bodily injury to another intentionally or knowingly [p. 1018] threatens or places another in fear of imminent bodily injury and death or if they use those things plus using a

deadly weapon or causing serious bodily injury, we have an aggravated robbery. Okay. All right, I can't show you what a person is thinking. I can't go into a person's mind, pull it out and hand it to you as a piece of evidence. Intentional will be defined for you by the Judge. A person acts intentionally or with intent with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct and cause the result. So would you have problems with this, I can't show you what a person is thinking, but I can show you what he did and by what a person's actions are, one can determine one's intent. Can you also agree, sir, that by a person's words you can determine what their intent is without any actions or a combination of words and actions. Any problem with that?

A There would be no problem.

Q Okay, now, you understand our law in the State of Texas, when a person becomes 17 years [p. 1019] of age, male or female, it doesn't matter until the day you die you are an adult and responsible under the laws of the State of Texas as a criminal or the criminal laws as an adult. Does the mere age of a defendant or anyone charged with a crime, would that affect you in your deliberations to a point, simply because somebody is young or they are old, just the mere fact of age?

A It might have a bearing on it, yes.

Q Okay, would it have a bearing on it on the effect that you would not be able to, if you believed beyond a reasonable doubt that the person charged with an offense, the State proved to you beyond a reasonable doubt that that person did it, and simply because, say,

that person was 65 years old, would you say that person is not guilty?

A I could probably say he is guilty, but not to a first degree murder.

Q What I am saying is on the offense, in other words, say if that person was 17 years old, and the State proved beyond a reasonable doubt that you could – could you find that person guilty, if you believed the State had [p. 1020] proved it to you beyond a reasonable doubt as to the elements of the offense?

A I could probably find him guilty to a certain degree.

Q We are talking about capital murder. Would the mere fact that an individual is 17 years of age stop you from finding that person guilty of capital murder when the death penalty is a possibility?

A I imagine I would have to know all the circumstances involved in it before I can answer that question.

Q I'm asking you mere age, the mere age alone, I am saying that you believe the State has proved everything else, it is just the age, a person 17, would that stop you from – if you believed it?

A If I believed it, it probably wouldn't stop me.

Q Now, I'm going to go over an example that I am going to use in discussing my next question, and then the questions in reference to the punishment phase of the trial. Okay, let me give you an example. Let's assume that this room is a 7-Eleven store, okay?

[p. 1021] A Okay.

Q And that there are four people inside the store, that you are there where you are at, except, let's substitute Mr. Addudel in the position you are in because you are going to be a juror, and Ms. Northcutt is where she is at, and Mr. Thornton is where he is at, and that the clerk is going to be Mr. Pollinger, the bailiff over here sitting at the desk. You can't see him from where you are at right now?

A No.

Q Okay, let's say there is an obstruction like that, and furthermore, let's assume there is an obstruction between this table where Mr. Thornton is and where Ms. Northcutt is. Further, let's assume that Mr. Pollinger is near the end of the shift and he has just pulled – checked out the register and put the money in a drop bag, one of these bank drop bags. He had a coat on and part of the bag was sticking out and before he was getting off his shift, he was stocking some shelves, and he has a box in his hand, going like this. I'm going to be the robber. Okay, and I come [p. 1022] through the door. Mr. Addudel hears something, but he doesn't see me, kind of like you are, might see somebody coming through but not recognize who it is. Ms. Northcutt is where she is at and I approach and I see as I walk up to Mr. Pollinger out of his coat that part of that money bag is sticking out, and I know what it is, and I walk up to him, and I start reaching for it, and he is holding the box now and he turns away from me, and I reach for it again. I grab him and I pull a pistol and start coming up towards his head, at which time Mr. Thornton hollers and when I see Mr. Thornton, Ms. Northcutt also

sees me, but she is looking at that gun, not me. She sees that gun and she hits the floor. Probably like – I turn and shoot Mr. Pollinger, who is two or three steps away from me, and I run out the door. I am caught later on and let's further assume that they didn't get the gun that I shot Mr. Pollinger with. I didn't leave any fingerprints in there, and they didn't catch any property on me that I might have taken from the store. Okay, all they got is me, and I am being tried for capital [p. 1023] murder. Let's further assume now that we are in the trial. You are a juror, and the State has proved every element of that offense to you beyond a reasonable doubt, that a murder occurred, that it was during the course of a robbery, that it was in Harris County and it was on or about a specific date, and we are looking to the issue who did it, okay?

A Okay.

Q Mr. Thornton takes the stand and he testifies and he points me out in the trial and says Carl Hobbs is the one that shot and killed Mr. Pollinger on that date. Okay, and in that instance, all there is is a single witness, one eye witness. She was down and she didn't see who it was. Mr. Addudel was where he couldn't see what happened. Mr. Thornton saw what happened, and Mr. Pollinger is dead. Could you, if you believed Mr. Thornton's testimony that I was the one that shot and killed Mr. Pollinger, base a conviction for capital murder upon a single eye witness testimony?

A If you were convincing enough, I would.

[p. 1024] Q So, you would want to hear and if you believed that person beyond a reasonable doubt, not all doubt, but beyond reasonable doubt, you could do it?

A Yes.

Q Now, if in the instance there, say I was – I'm now in my thirties say I was 19 years old, when I robbed the place, would that affect whether or not you would find me guilty, just because there was one witness?

A If I was certain that you identified the right man, it wouldn't have a bearing on it.

Q So if it were proved to you beyond a reasonable doubt, it wouldn't matter how old I was?

A Right.

Q Now, let's go into the punishment phase, and the reason we are going to go on this, and let's talk about theft for a minute. Murder plus to get capital murder, we always have to have murder plus in the commission of aggravated robbery, in the course of committing theft. Remember the definition for robbery, conduct that occurs in the attempt to commit, during the commission or [p. 1025] in immediate flight afterwards. In other words, I don't have to getproperty [sic] to commit aggravated robbery. If I came up to you and pulled a pistol on you and a police officer came up and stuck a pistol behind my back, the back of my head after I said give me your money and he said drop it, I have committed aggravated robbery. Do you understand that is our law. Does that pose a problem for you?

A No.

Q Let's do this. The pen that you have got, I see those two pens that you have got in there and this one is out of ink, and I am going to take those. I walk up to you and I take them. I haven't said anything, and I turn and

start walking back to where Ms. Northcutt is, and you come up behind me and say give me my pens back, and you tap me on the shoulder and I turn around and stick a pistol in your face. I have committed aggravated robbery because not only I haven't attempted, I have taken it, and in the immediate flight after stealing because I have robbed you and you haven't done anything, [p. 1026] but when you came up behind me and I have a weapon, I have committed aggravated robbery. I can have the property but I don't have to get it to commit it. Now, let's assume in our fact situation that you have found me guilty of capital murder. Now, you have got to look at what is going to happen to me in the punishment phase of the trial. The first question is whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with a reasonable expectation that the death of the deceased would occur. Okay?

A Okay.

Q Needless to say that special issue makes you look at what happened during this particular offense that you have just found me guilty of. You have to look at what I did when I shot. Did I do it deliberately. Now deliberately doesn't mean premeditated, okay?

A Okay.

Q It is defined by Websters as meaning willful or voluntary. Do you have problems with that?

A No.

[p. 1027] Q If I walked up and I just immediately walked up here and pulled this out, I immediately pulled this cup out and fill it halfway with water, a deliberate

act, that didn't take premeditation. A deliberate act. Deliberately walking in there and filling it up. Now, whether the act was deliberate in causing the death and was there a reasonable expectation that the death of the deceased would occur. And if I came up in a situation and Mr. Pollinger – and when I shot him, if I shot him in the foot, there might be a question yes; I deliberately did it, but is there a reasonable expectation that he is going to die because I shot him in the foot. I shot off his big toe. It doesn't make me less guilty of the offense, but it answers this question, yet on the same time if I turn and shoot him in the chest, it is a little bit different. You have to look at the situation. Could you do that, so you would have to look there and answer if you believed beyond a reasonable doubt the State still has that burden beyond a reasonable doubt to prove that the answer should – to this should be [p. 1028] yes. If you believed the State had proved it to you beyond a reasonable doubt, could you answer it yes?

A Yes.

Q Now, special issue number two, we are going to be iooking at two key phrases. Probability and then criminal acts of violence, which constitute a continuing threat to society. Before we go into it, let's say we are going to be talking about society in a very broad term, that society being not only our day-to-day activities, but would you agree with me that people that work in prisons and in jails are part of our society, too, as well as those people that are in jail, they are part of our society, okay?

A Okay.

Q When we talk about that society, I want you to think about those people. I want you to think about those acts of violence and a continuing threat to those people, too. Now probability, where there is a probability. Now, the probability won't be defined, and in this special issue number two, I think you can see this is where you are going to have to [p. 1029] have additional evidence besides what you have heard in the first part of the trial, what is that type of evidence? Well, in the evidence that the Judge deems admissible and relevant to the issues before the jury. So you, as a juror, could possibly hear some of these types of things, prior criminal record, if any, other acts of criminal violence, if any, reputation witnesses could be good or could be bad. So I think you can see you cannot automatically answer yes or no. You have to look at certain factors in the punishment phase to determine whether or not you are going to answer it and how you are going to answer it, whether there is a probability. Probability doesn't mean absolutely. It does not mean 100% it is going to heppen [sic]. I am sure that you have a definition for yourself on what probability is. Likely, Probable. More than likely. I [sic] doesn't mean it is going to happen. Now, we are going – remember what the Judge talked about, criminal acts of violence. It can mean as little as me going up and slapping Ms. Northcutt. That is a criminal act of violence or coming back in [p. 1030] here and taking a knife and cutting this plastic container of this water. Criminal act of violence. Or knocking you out of that chair, shooting you, robbing you, kidnapping you or murdering you. Now, looking into that and in that, do you have any problems with that?

A No.

Q So you are going to look at the offense, itself, and then these other factors that the Court can allow into evidence before you make your decision. Now, you are also going to have special issues number one and two to answer. Do you have any problems with that?

A No.

Q If you believed beyond a reasonable doubt that the State has proved, now we can't tell you that he is going to absolutely do it in the future. It says is it probable, based upon what you have seen. Now, do you supervise people in your job, sir?

A No, sir.

Q Okay, you have in other types of situations, haven't you?

A Yes, sir.

[p. 1031] Q Now, you make decisions about things based upon the evidence that you have. If you are going to promote somebody, you look at what he has done and what he is doing now and what he has done in the past and project is he going to be a good man to put in this new slot or is he the type of man I have to fire because he has done this and he will probably do worse in the future. You do that every day of your life?

A Right.

Q No problem with that?

A No.

Q Now, special issue three comes into play if it is raised by the evidence. It could be very slight, but if it is even there and it is raised, it is something that you have to consider. Now, let's break that down to the extent of you have got to do two things. In the example that I used there, sir, we have got to decide. Your duty as a juror, first of all, is whether or not there was provocation. It says provocation, if any, and in essence, what actions, what did Mr. Pollinger do? Did he do anything and if he [p. 1032] did something, you have got to decide in your mind was it provocation. First of all, you have got to decide, he might have done something you might say to yourself it is not provocation. If he did something else, you might say it is, depending on what he did. And the situation that I gave you is the example all he did is when I reached for the money, he pulled away, and I shot him. Then you have to look at what I did in relation to what, if anything, he did. And look at the fact situation and base your judgment on that. So you have to look at the facts again. You can see that it might be a little bit difficult. It might be. It says if the reaction, my reaction in shooting him was unreasonable? If you say yes, it was unreasonable, then you ought to answer it yes. And do you realize that if you get three yes answers, by answering them, the Judge is going to have to give the death penalty. Could you, knowing that yes answers would result in the death penalty, if you believed it beyond a reasonable doubt, say yes, knowing that the death penalty would be the punishment?

[p. 1033] A Yes, I could.

Q On the other hand, if one of them is answered no, then it is life imprisonment. Let's change the fact situation there a little bit. It is still a question, say, in the instance there when I came up, I didn't pull a gun like I did on Mr. Pollinger. I took the money. I walked up to him and I saw it there and I jerked it out. I started walking away. He runs to the cash drawer, pulls out his pistol, and I get to the door and he shoots me in the back, and I hit the ground. When I get up I start to get up to get out the door to get away and he shoots me again in the leg, and I turn and I shoot him and kill him. I've still wrong, but you have to ask was what I did, was it provocation and was what I did and when he shot me, was it unreasonable for him to shoot me for what I did? He is not, and in doing it, the law doesn't say he is right, it just asks if it is reasonable under those circumstances. So, you have to look at those circumstances and you can see they can vary?

A Yes.

[p. 1034] Q One instance, something minor, it might not be provocation in your mind. You are going to have to weigh it. Do you have any problem with that, sir?

A No problem.

Q Now, sir, is there any question on something we have discussed thus far that you have not – that I haven't explained very well or some question that has been raised that you would like an answer to?

A Well, I would like to know if you could define the mind of the defendant at the time of the robbery, you

know, was the guy in a stable mind or was he a problem or was he under the infludence [sic] of alcohol.

Q This is the one thing we cannot talk about, the facts of the case. The law doesn't allow us to talk about them, just in general.

A Okay.

Q The purpose in that is when you sit here, can you be fair and can you follow the concept of law and give the defendant his rights and give the State their rights, and then hear the facts fresh, and then based upon those facts, decide the questions based upon the evidence [p. 1035] that you hear. Can you do that?

A Yes, I think I can be fair in my decision.

MR. HOBBS: We will pass the juror.

THE COURT: Mr. Killgore, let me give you this one further instruction. A defendant or an accused in a criminal case cannot be held criminally responsible for his actions if he is found to be mentally incompetent at the time of the offense or at the time that he is brought to Court for his actions, and that also holds true if he is found to be mentally insane. Obviously, as Mr. Hobbs has said, we cannot go into any facts concerning Mr. Graham in this case. I can just give you that general proposition as a matter of law. Mr. Thornton?

[p. 1036] EXAMINATION BY THE DEFENSE

QUESTIONS BY MR. THORNTON:

Q May it please the Court?

THE COURT: Yes, sir.

Q My name is Chester Thornton. I will introduce myself, again. I am one of the cocounsels representing the defendant in this case, Gary Graham. It is now my opportunity to talk with you and discuss certain personal views that you might hold concerning certain issues. The reason I am asking the question is – the reason I am asking personal questions is not to embarrass you or in any way debate with you on your views. It is merely to find out how you feel on certain issues. Would you agree with me this is a very serious matter, would you not, the determination of someone's life or whether he will die?

A Yes.

Q So far, we have been dealing with the abstract of the term death penalty, and the seriousness or the result is now upon us. Wouldn't you agree that now we must examine you to determine whether you can be an impartial [p. 1037] juror, then you face the possibility of having to sit and make a decision on the person's life or death in this case, this individual right here?

A Right.

Q I want to ask you first about your job. You said you are a cargo agent with KLM Airlines?

A Right.

Q Do you at any time supervise personnel?

A Not at that job.

Q Do you hold another job?

A Janitorial business where I do supervise.

Q Is it your own business?

A Yes.

Q How many people do you have employed with you?

A Different, maybe 3 or 4 at the most at one time. right now it is not.

Q Is it a job you do after you get off your regular job?

A Right. Right.

Q So you are quite a busy man during the day?

A Right.

Q I notice also that you have served in the armed forces, the armed forces – the Army [p. 1038] E-4 January 1962 to 1960 [sic] and I can't see the last portion?

A December, 1968.

Q December, 1968. Did you happen to have an opportunity to serve in Viet Nam?

A Yes.

Q Were you in the combat or did you actually do any fighting?

A No, I didn't.

Q Okay, I also notice that you have never been or any member of your family has ever been a victim of a crime?

A No.

Q Okay, and you have never been or any family member a witness in a crime or criminal case, right?

A No, sir.

Q You have never served on a jury?

A I have been called, but I never served.

Q Okay, so basically, this whole experience is new to you, wouldn't you say?

A Yes.

Q Okay, could you explain to me basically what your first impression was once you received your jury summons, what was your first thought?

[p. 1039] A My first thought was probably how I could get out of it when I got up here.

Q And what was your first thought when you found out you potentially would be sitting on a capital murder case?

A I thought with the length of it, how long it would take.

Q Did you feel in any way, did you think in any way about your – about the possibility of you having to make a decision on one's life or death when you found out that you were potentially sitting on a jury in a capital murder case?

A I never really had thought about it.

Q Did you understand the Judge and the prosecution when they explained reasonable doubt and the other issues involved in a criminal case?

A Yes.

Q That doesn't cause you any problems?

A No, sir.

Q And did you also understand about the presumption of innocence that the defendant had?

A Yes.

[p. 1040] Q You would be willing to carry that presumption of innocence all the way through until all of the evidence and the facts have been presented to you?

A Right.

Q Do you understand the theory or the concept of reasonable doubt?

A It is to make a judgment on my own on what I think the situation would require.

Q Okay, and in the situation where a person is charged with capital murder, okay, would that change how you would view reasonable doubt instead of the situation where a person was just charged with theft, say a misdemeanor theft, he went into a store, say, and stole a clock radio, or just say a little radio that might have been valuable or valued at $12.00?

A I think the fact that a man's life was taken has a great effect on my decision.

Q Okay, would you weigh it any differently or would you try to weigh it differently?

A That would be a lot different if it wasn't a crime committed in this state.

Q Okay, would you view reasonable doubt any differently, knowing that if the defendant [p. 1041] was found guilty that he faces a mandatory of either life or death?

A I can't answer that right now because I don't have any of the background or, you know, I couldn't answer that right now.

Q Okay, would it affect you on how you would say deliberate on any issues of fact, as far as the fact that the defendant faces the possibility of either life or death, in say, weighing some issue of fact that you might have heard from the witness stand? Would you place any different weight on it, just because there is a life-death situation involved?

A Not in this situation, I wouldn't.

Q Okay, I assume by your affirmative answer to the Judge when he asked you if you had any religious, moral or conscientious scruples against the death penalty that you did not?

A The only think I was saying is like it says, if a man takes another man's life where you get an eye for an eye and a tooth for a tooth. That is the only thought that came to my mind.

Q Had you formed – strike that – you had formed the opinion about the death penalty before you came here, am I right?

[p. 1042] A Yes, sir.

Q Could you tell me what your views were on that, on the death penalty and capital punishment?

A I think that it is a necessary part of our society. If it is not stopped now, crime will continue at the rapid rate it is going.

Q So, will I be correct in assuming that you feel that the death penalty or capital punishment is a deterrent to crime or that it would keep someone else from, say, committing some later conduct?

A I think it would.

Q Okay, do you have particular crimes or are there any particular offenses that you feel deserve the death penalty and others that do not deserve the death penalty?

A I feel like a rape charge or taking someone else's life would require a death penalty.

Q Okay, are you saying that because a person has been found guilty beyond a reasonable doubt to have taken a person's life, then that would automatically mean that that person should get death?

A Not automatically. I think, you know, I [p. 1043] wouldn't know all the facts, so I can't say automatically.

Q Okay, what type of facts would you want to know in reaching your decision on having to make a decision? What would you want to know, you, Mr. Killgore?

A I would have to know all of the background of the victim, know what his motives were, what state of mind he was in at the time of the robbery.

Q Okay, when you – excuse me. You had formed a conception of capital punishment before coming here, right?

A Yes.

Q Had you ever examined those issues or ever looked at those issues before you came to Court of – or those issues – are those issues new to you?

A Yes, sir.

Q After considering those issues, do you think that your opinion about capital punishment or the death penalty has changed or altered on how you would make that decision? Do you think that has changed?

A I think it has changed to a certain degree.

[p. 1044] Q. Okay, in what respect, please?

A In that you have so many different facts that you have to consider for the death penalty.

Q All right?

A And I realize that there is a lot more involved in it than just a man killing another man.

Q Okay, is that something that you feel now that you did not feel prior to coming to Court?

A Yes, sir.

Q Okay, so your conception of the death penalty has changed to the extent on how you would make a decision, am I correct?

A That it has, I think it has.

Q No whether you believe or don't believe on just how you would make that decision, right?

A Right.

Q Would you be able to weigh all of the facts and make a decision after examining the issues, each issue separately, weigh all the facts that you hear?

A Yes, I think I can make an intelligent decision on it.

Q Could you tell me, have you ever discussed your views on the death penalty with anybody else?

[p. 1045] A No, sir.

Q How do you think that you might have formed your views, I'm not asking you specifically, back in 1957 did you finally say, I want the death penalty, I'm asking you how you think you might have formed those opinions?

A Well, all –

Q Besides your father and friends?

A All the innocent people that are killed for no apparent reason, whether it is the defendant's fault or it might be aggravated, premeditated. It is something that you just have to think about before you make a decision on it.

Q Okay, and you have no problems with the issues involved?

A No, sir.

Q Okay, and you can go by the guidelines that have been established in answering those questions?

A Yes, I can.

Q You have no problems with that?

A No, sir.

Q Okay, going to special issue number one, would the fact that you have found the defendant or [p. 1046] you believe a defendant has been found guilty beyond a reasonable doubt, say, we have gone past the guilt or innocence, all right, you are satisfied in your mind beyond a reasonable doubt that the defendant is guilty, okay, would the mere fact that you have established that in your mind make you automatically answer the first part of special issue number one yes?

A After I have had all the facts, I think the whole question would have to be answered before I made a decision.

Q What I am asking you is basically, can you see the distinction or difference between the first part of special issue number one, that is different from the guilt or innocence phase of the trial?

A Yes.

Q Okay, and that just because you have found somebody or you believe beyond a reasonable doubt that they are guilty doesn't make you automatically answer number one correctly, the first part of number one yes, not correctly, but yes, okay?

A Right.

[p. 1047] Q All right, can you conceive of a situation in going to the second part of number one and with the reasonable expectation that the death of the deceased or another person would occur, okay, can you conceive of a possibility where a person's conduct did cause the death, okay, his conduct did cause his death, what he did, not

the actual killing, but what he did, did cause the death, okay?

A Right.

Q Can you conceive of a hypothetical situation and I will use this, where a person came in and he had a .357 Magnum and he came into the store to rob the teller who was behind the counter, and he came in and he did shoot that individual, okay, he did shoot that individual, that was his conduct, the shooting was his conduct, okay, but can you conceive of a situation, this possibility where he just fires in the general direction or in the direction of the shop owner, okay, and him not have a reasonable expectation that the death would occur, can you conceive of that possibility?

A Yes, like a warning shot or something just to [p. 1048] get their attention?

Q Let's not say it was a warning shot, let's just say that he meant to strike the individual, okay, he wasn't shooting a warning shot, he meant to strike the individual, but he did not have a reasonable expectation that the death would occur, can you conceive of that possibility?

A Not if he purposely shot at him, I couldn't see that.

Q Okay, you – using a hypothetical situation, where we are in a 7-Eleven and I'm the defendant, and I am the individual and I walk into the store and I have a .357 Magnum, and I come in and I point the gun at the shop owner and tell him to give me his money. He hands me the money. All right, I am leaving. Okay. If for whatever reason I turn around and fire, okay, now, if I come in and

point the gun at his foot and shoot, wouldn't you say that I had no reasonable expectation that the death would occur?

A If you pointed it at his foot, I would say that.

Q And if I came in and put the gun right at his [p. 1049] temple and shot, wouldn't you think that I did have a reasonable expectation that death would occur?

A Right.

Q Okay, so could you consider a possibility where a shot was just fired, not in any particular portion of the body, but the shot was just fired, can you conceive of that possibility?

A Yes.

Q Does that cause you any problems?

A No.

Q And if it was shown to you beyond a reasonable doubt that that did happen, that a shot was just fired, could you answer special issue number one no?

MR. HOBBS: Your Honor, I object to the form of that question as being improper under the circumstances set out by counsel.

THE COURT: Sustained.

Q ~~Can~~ you see the possibility where you go into the store, I go into a store, not you, but I go into a store, and I just fire the weapon in the direction, and I meant to hit, okay, [p. 1050] just fired in that direction, but I didn't expect the individual to die, can you conceive of that possibility?

A No, if you shot at him and meant to hit him, I can't see that you wouldn't think that he wouldn't die.

Q Okay, but if I point it at his foot?

A That would be a different situation.

Q Okay, going down to special issue number two, whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, in the context of that special issue, how would you define probability? How will you define probability?

A In issue number two, I would define it as whether the defendant would repeat the same crime or whether he would be a threat to his fellow man.

Q Okay, would you say whether it was likely?

A Whether it was likely that he wouldn't repeat another crime of that sort.

Q Okay, and wouldn't you agree with me that that is kind of like your hired to make a prediction in a sense, right?

[p. 1051] A Yes, sir.

Q You are going to have to kind of look in your inner feelings, plus looking at the defendant and whatever facts they have presented to kind of make a judgment, right?

A Right.

Q Okay, does the fact that you have – might have to make a judgment or predict the future in any way bother

you on the ultimate result of life and death of the defendant?

A It wouldn't bother me if I had all the facts of his previous history.

Q Okay, would you want to know whether or not he committed other acts of violence in the past?

A Yes, I would.

Q Would you want to hear testimony as far as whether he would commit other acts of violence in the future?

MR. HOBBS: Your Honor, I object to that as being improper in the way it has been phrased in its present status.

THE COURT: Sustained.

Q Would you want to know something about the individual's background?

[p. 1052] A Yes, I would.

Q Would that make a difference to you?

A Yes, it would, if all the facts were presented.

Q If all the facts were presented?

A If he was that bad.

Q When I speak of background, the only facts that are presented is what is said from the witness stand. If nothing is said from the witness stand about the defendant's background, then you cannot consider that, do you understand that?

A Yes, sir.

Q Okay, what you might have heard out in the hall about the defendant's background is not under your consideration. Do you understand that?

A Yes, sir.

Q Okay, so you would consider a person's background?

A Yes sir, I would.

Q And in considering a person's background, would you say that his environment had something to do with his background?

MR. HOBBS: Objection, Your Honor, as being irrelevant and immaterial to the [p. 1053] issue before the Court and the jury.

MR. THORNTON: May I have an opportunity to respond?

THE COURT: Yes, sir.

MR. THORNTON: The potential juror has already stated that he would consider an individual's background, and the individual's background is for and not inclusive on any particular point, and I think this is what I am trying to find out, what he would consider in a person's background.

THE COURT: He has answered that he would consider the person's background and it's repetitious, Mr. Thornton.

MR. THORNTON: I don't think so, Your Honor. Are you sustaining the State's objection?

THE COURT: Yes sir, sustained.

MR. THORNTON: Please note my exception.

Q (By Mr. Thornton) Would you consider a person's maturity?

A There is no way I can know how mature the person is.

Q If you had any evidence on that fact, would [p. 1054] you consider that?

A That might be considered, yes.

MR. HOBBS: I object, and I would ask the Court to instruct the witness that the aspect of maturity is not a consideration in that the law requires.

THE COURT: That is overruled.

Q You can consider that?

A Yes, sir.

Q Because in predicting a continuing threat to society, aren't we, in a way, having to make a determination whether or not a person's conduct will continue to be the same way it is then, wouldn't you agree?

A Yes, sir.

Q And in evaluating, and in evaluating a person on whether his conduct would continue to be the same way as it has been in the past, don't we need to know something about that individual?

A Yes sir, that is why I said I wanted to know the past history.

Q And in his past history, wouldn't you agree that trying to make a determination on how he would act in the future you need more than [p. 1055] just how he acted in the past?

A I don't understand how could I have more than how he acted in the past?

Q The probability, okay, what we are dealing with is probability in a very abstract term. It is something that is not concrete.

A How would I feel that he would act in the future is, is that true?

Q Right?

A Yes.

Q What else would you like to know or what else would you, as a juror, would you feel, as a juror, you would need in answering special issue number two, considering that a life, it is a life and death situation; looking at special issue number two?

A Probably have to know whether the defendant was willing to be rehabilitated.

Q Would rehabilitation come into your mind, into consideration, the rehabilitation?

A Well, I don't know unless this was the first offense, I would have to know all of the aspects of the whole thing.

Q You mentioned earlier the Biblical passage "An eye for an eye and a tooth for a tooth"?

[p. 1056] A Yes, sir.

Q In the context of what you know now and what you will be required to do as a juror, how has that altered your belief concerning that passage, or your feelings concerning that passage?

A I would have to know the degree in which the act of violence was committed, and in what state of mind.

Q Okay, and just for the mere fact that a murder has been committed wouldn't automatically make you vote for death?

A No sir, it wouldn't.

Q Okay, you would be willing to consider other factors?

A Yes, sir.

Q Okay, I see here that you have also stated that a member of your family was employed with law enforcement. You said he was a security officer. Who is that?

A I would rather not answer that question.

Q It would be pertinent, it would be helpful, there is no way I am attempting –

A I would rather talk to the Judge about it.

THE COURT: Obviously, we have to [p. 1057] evaluate your state of privacy. If you have someone who is related in law enforcement, the question we have to ask you is this, is the fact that you have a person whom you know or are related to who is involved in law enforcement, since there is that fact that you have that association, would it cause you to be unfair and lean more

favorable to one side or the other because you have someone that you know who is involved in law enforcement?

A Sir, it wouldn't have any effect on the way that I would answer the questions with all the facts that we have, but I would rather not answer that.

THE COURT: Well I am not asking you who it is.

A Okay.

THE COURT: Or what they are involved in. What I am asking you is we have told you at least fifty times during this interrogation we need someone who is fair and impartial?

A Yes, sir.

THE COURT: And who can be not only [p. 1058] fair and impartial to the State of Texas, but also fair and impartial to this defendant. Obviously, by virtue of the fact of someone that you know or whom you are related to that is involved as a security officer, possibly in some form of law enforcement, the issue becomes relevant because of that association. Would you tend to be more aligned with the State or would you give more credibility to the State's witnesses, merely because of the fact you know someone who is a security officer?

A Yes, I was a security officer.

THE COURT: You were a security officer?

A Yes, sir.

THE COURT: Because of the fact you were a security officer, would that tend to make you believe the State of Texas' witnesses more than a witness that would testify for the defendant?

A I don't think it would have any effect on it.

THE COURT: Okay, well that is obviously – let me take it one step further. I know absolutely nothing about the State's [p. 1059] case. I do not know who they are going to call as witnesses. I don't know if there are Houston Police Officers that will be called or any law enforcement officers that will be called. Because you were in the past a security officer, do you think that you would tend to give more credibility or more believability to the police officer, merely because of the fact that he might be a police officer?

A It might have a bearing on my decision.

THE COURT: It might have a bearing on your decision?

A Yes, sir.

THE COURT: Are you telling me, then, Mr. Killgore, that you would tend to believe a person, let's assume you have someone testifying the color of a car was black and that person was not a police officer, just an everyday citizen, aznd [sic] you have a police officer testifying that the color of the car was gray, so you have obviously these two very different pieces of testimony. My question is would you believe the police officer over the citizen merely because of [p. 1060] the fact that that other person was a police officer?

A No sir, I wouldn't.

THE COURT: All right, any further questions, Mr. Thornton?

MR. THORNTON: Just a couple, Your Honor.

EXAMINATION BY DEFENSE (CONT'D.)

QUESTIONS BY MR. THORNTON:

Q Mr. Killgore, my asking that question is not to pry and come back and release any information. It is purely as the Judge stated, I'm just trying to attempt to find out whether there is any inferences that might affect you as a juror, okay?

A Yes.

Q And I'm in no way trying to gather information from you to take to anyone else or anything like that, okay?

A Yes.

Q Approximately how long ago has it been since you were a security officer?

A Probably about 12 years.

Q Okay, was there anything bad about the [p. 1061] experiences of being a security officer that might affect you in this case, in being able to sit down as a fair and impartial juror in this case?

A No, I also have a brother-in-law that was in law enforcement at one time.

Q Okay, he is not in the law enforcement any longer?

A He is a private detective.

Q Okay, would you be able to make your own decisions and own determinations about this case and the evidence on your own independently?

A Yes.

Q Say if something came up in the middle of the night that you thought about, you wouldn't pick up the phone and say, call him and ask his opinion on it, would you?

A No.

THE COURT: Anything else, Mr. Thornton?

MR. THORNTON: Yes, sir.

Q Mr. Killgore, has the impact of your obligations met you yet? Has it come to you yet, the fact that you might be in a position in determining life or death of an individual, [p. 1062] has the full impact, that hit you yet?

A Yes, it has.

Q Okay, and you feel that you can be a fair and impartial juror?

A Yes, I can.

MR. THORNTON: I have no further questions.

THE COURT: What says the State, Mr. Hobbs?

MR. HOBBS: We will accept.

THE COURT: What says the defense?

MR. THORNTON: The defense will accept, Your Honor.

THE COURT: Mr. Killgore, will you stand and be sworn by the clerk?

(At this time juror sworn.)

THE COURT: Mr. Killgore, as you can tell from the nature of this process, this is a long process. You are juror number 6, and we have 6 more to go before – before the full testimony in the case will begin. We will anticipate that we will start testimony a week from Monday. We have a phone number you can be reached at. We can contact you at some point next week to let you know that [p. 1063] we will for certain start on Monday the 26th. The trial will actually be held in my courtroom, which is on the 4th floor of this building. If there is any reason for you to contact us, you may contact Mr. Pollinger, who is the bailiff, who escorted you over here this morning. I know by virtue of your employment with KLM, you may need something to show you have been on jury service. My clerk will give you this information and we will be contacting you next week to let you know when we will get started. You are free to go about your normal routine. You are excused at this time. See on the 26th.

* * *

[p. 1084] MR. DAVID GILROY, called as a prospective juror, after having first been duly sworn, testified as follows:

EXAMINATION BY THE COURT

Q Thank you for your patience. I know it has been a long day for you. I will try to be as short as we can be, but we have to take time because it is obviously a serious matter. I know that from looking at your juror information form you have had prior civil jury service, but not prior criminal jury service, is that right?

A That is true.

Q Was there anything I discussed with you this morning relative to the trial of a criminal case that I need to repeat or was there any problems to you this morning?

A I understand the difference between the two.

Q All right, sir, the thrust of what we wish to speak with you about this afternoon has to do with obviously your ability of serving as a juror in a capital murder case. As I told you this morning, the defendant, Mr. Graham, was charged with the offense of capital murder. [p. 1085] It is an offense that carries the possibility of the death penalty as punishment, and that is why I ask you individually and the 10 of you collectively to think about your personal thoughts and beliefs as to your feelings about the death penalty and whether or not you could participate in the jury verdict in which the death penalty was considered as punishment. Once again, we are not in any way trying to embarrass or pry. It is just we must know

the answers to these questions in order for us to determine if you can be a fair and impartial juror in this case. Mr. Gilroy, do you have, first of all, let me ask you this, have you formed an opinion one way or the other, not necessarily today, but in your past deliberations in your 29 years on this Earth, have you formed an opinion one way or the other, either for or against the death penalty as punishment in a proper case?

A I believe I am for it.

Q All right, sir, I take it by your answer, Mr. Gilroy, that you do not have any conscientious, religious or moral scruples against the imposition of the death penalty as punishment [p. 1086] in a case that you thought was proper, is that what you are telling me?

A Right.

Q All right, sir, let me spend a little time explaining to you the nature of the proceedings in a capital murder trial, and then we will talk specifically about the issues. As I told you this morning, the burden in all matters in a criminal trial is upon the State of Texas. The State of Texas not only must prove to you beyond a reasonable doubt that the defendant is guilty of the crime that he is charged with, they must also prove to you beyond a reasonable doubt that the manner in which you answer special issues that are submitted to you should be answered in a form consistent with the Court imposing the death penalty as punishment. The State has the burden of proving to you that that is what your answer should be, and the State must carry this burden by presenting testimony that is relevant to at least two special issues that are presented on the punishment phase of the

trial. The jury, in response to whatever testimony is presented, answers these special [p. 1087] issues in their deliberations, and it is the manner in which these special issues are answered that dictate to me what punishment this defendant should receive. I know that you have had prior civil jury service so you are familiar with the concept of special issues. You received those before in your jury service. There is a further degree of similarity between the special issues in a criminal case and a civil case in the manner in which the number are required for a jury's answer. If the jury answers these special issues yes a unanimous verdict is required, just as the guilt verdict on the guilt or innocence phase requires a unanimous verdict, as does the not guilty verdict if you choose to vote not guilty. On the punishment phase if either of the special issues are to be answered yes, which ultimately means yes, the defendant should receive the death penalty, a unanimous verdict is required. If the jury answers or chooses to answer either special issue no a 10 - 2 verdict is required, which is synonymous with the verdict in a civil case. In answering the special issues, if [p. 1088] there is a vote of less than 10-2, the jury will be instructed to continue their deliberations until a verdict is reached. Again, principles applying to the civil case. Special issues are the State's burden of proof, once again, being beyond a reasonable doubt and the numbers that are required to answer the special issues and the fact that a set of yes answers result in the death penalty for the defendant, one or more no answers result in life in the Texas Department of Corrections. Those are the only two punishment alternatives. Do you understand?

A Yes.

Q The punishment phase of any capital murder case that reaches the punishment hearing will have at least two special issues. Those two special issues are pinned to the bulletin board, which is to your right. If you will take a moment to view those special issues and we will talk about them?

A All right, sir.

Q In special issue number one, we are obviously asking you to reflect upon the testimony that you have heard in the guilt or innocence phase [p. 1089] of the trial relative to the defendant's causing the death of the deceased. You must determine if the act which resulted in the death of the deceased was done by the defendant deliberately, number one, and did he have a reasonable expectation that the death of the deceased would result. So we are asking you to reflect back on that testimony. In viewing the phrases deliberately and reasonable expectation, I must inform you that there will be no legal definition provided by the Court. It is a matter of your common sense, and that is true throughout these special issues. It will not give you any definitions or instructions. That is contrary to the guilt or innocence phase, and I will give you the definition on instructions, and so you are free to interpret these terms in any way you deem proper. In viewing the term deliberately, I construe deliberately or his intent. A voluntary act on his part. It is contrary to accidental. By the same token it does not necessarily equate premeditated. In my mind, a person may do something deliberately, but not necessarily do [p. 1090] so in a premeditated fashion. Would you agree with that, sir?

A Yes.

Q Okay, secondly beyond a reasonable doubt, reasonable expectation of death. There are certain sets of facts that may cause you to answer this one way or the other. Let me say this initially. In our search for 12 people to be jurors in this case, we are hoping to find 12 people that will have an open mind when they view these special issues. There are those who feel that if a human being takes another human being's life, he should automatically receive the death penalty regardless of any mitigating factors, one way or the other. There are those who feel that another person's life should never be taken regardless, and could not impose the death penalty under any situation. We are seeking to find those who fall within the middle of the extreme. We are seeking to find persons who can assess the death penalty as punishment if they feel it is aproper [sic] case for it to be assessed punishment, but only do so after they hear whatever evidence or testimony is proper [p. 1091] on the punishment phase of the trial with regard to these special issues. Do you feel, sir, that you could have an open mind as to whether or not to vote to answers that would be consistent with life or death after all the testimony is presented and only to that point in time?

A Yes.

Q Let me give you two examples with regard to special issue number one that may bring about a different response from you. Assume with me that a person, a young man goes into a Stop and Go with a pistol and takes money from the Stop and Go and he does not intend to kill anyone. He intends to take money and has a wife and small child at home who are sick and cannot get money any other way, and he knows no one is going to

give him money. He goes in out of frustration, but does not intend to hurt anyone, and as he walks in the door, he slips on an apple that is left on the floor. He slips and the gun falls out of his hand and hits the floor and accidentally discharges and the clerk that is behind the counter is struck by the bullet as it is discharged and is killed. [p. 1092] The law would say that person very likely would still be criminally responsible for the offense of capital murder, however, you might view his actions when you would deliberate on special issue number one with regard to whether ornot [sic] he reasonably expected that the death of that clerk would occur. Would you agree with that, Mr. Gilroy?

A Right, there would be an argument.

Q You would see that he did not reasonably expect to kill that clerk. He expected to take money, but not to kill him?

A Right.

Q On the other hand you might have the cold blooded killing situation where he walks in with a pistol and guns the clerk down in cold blood, just out of sheer spite because he is an evil person and in that situation you very well might answer that yes, I think he did it deliberately and he reasonably expected to kill that clerk. So, you see there are many situations that fall within those extremes that would require your deliberation before answering that special issue. Special issue number two deals with your being called upon [p. 1093] to predict the future in some respect. We are asking you to view the conduct of the defendant in this case in which you found him guilty. We are asking you to view what other relevant

testimony is presented for you to determine if the defendant will probably commit criminal acts of violence in the future that would constitute a continuing threat to society. There are items that would be pertinent to you answering this question. Not only the facts of the case that you have considered on the guilt or innocence phase, but also a prior criminal record, if any, by the defendant, whether or not he committed any other crime, any other criminal offenses, what other people in his community say about him, either good or bad, and that very well might be a situation that you are dealing with a person who has 40 prior convictions to the other extreme does the person who has never been in trouble before and everyone in the community thinks he is a saint. So once again, we are dealing with varying situations, and the end result is that we must have 12 people who hear those varying situations before [p. 1094] making an answer. Would you agree to do that, sir?

A Yes.

Q Okay. Once again, I will not give you a definition of probability. You are a construction estimator, therefore, you probably work with statistics in some variation. You may view probability as being 51 or more per cent. In my mind probability means more likely than not. You may view it as a higher statistical fraction, but that is my definition, but you are the possible juror, not me. But once again, the upshot of this discussion is that you must use your common sense. Would the defendant probably commit criminal acts of violence. Acts of violence, once again, are very broad groups that range from the Class C assault offense of touching another person and that person finding it offensive to the other end of the spectrum,

which is the capital murder offense, and all the crimes in between, be they assault against persons, aggravated robbery, rape, kidnapping, crimes against property, criminal mischief, someone pouring paint on your car as it sits [p. 1095] in the parking lot right now. That is a criminal act of violence. There are a broad range of crimes that fall within that general category. And thirdly, would these crimes, the likelihood, this defendant would commit these crimes to the degree that he would constitute a continuing threat to society or ongoing threat to society; calling upon you to, as best you can, as a layman to predict the future as best you can. Those two special issues are presented in the punishment phase of every capital murder trial. There is a possibility, if raised by the evidence, that a third special issue may be presented to the jury on the punishment phase. The other two definitely will be presented on the punishment phase. The third is a possibility. If you will take a moment to ready that on the board. The first phrase that is important is if raised by the evidence. It can be raised by the evidence by one line of testimony. It doesn't require the testimony of 20 witnesses. One line is sufficient to raise it. If raised by the evidence, did the conduct of the defendant in [p. 1096] taking the life of the deceased, was it an unreasonable act by the defendant in response to the deceased's provocation to the situation. This issue presents personal difficulty to me in understanding what it means. This is what I believe it means. All of these special issues are admitted to assist the jury in deciding if the person should live or die. This issue is not presented to in any way excuse what the defendant has done. He obviously has done a horrible thing in taking the life of another

person, but our law says that if the person whose life has been taken in some way contributes to his death by adding provocation or contributing to the provocation in the situation, you may, as a juror, consider that in your assessment as to whether or not he should live or die. And if you feel that the person who is killed contributed to the total situation to the extent that the defendant, in taking his life is not acting unreasonably, then you would answer the question no. We do not feel that or I do not feel that the defendant acted unreasonably in taking the life of the deceased [p. 1097] because of the deceased's provocation, to be added to the situation. Once again, this is not a self defense issue. The defendant cannot claim self defense because he has provoked the difficulty in the first place by walking into that store with a loaded pistol, but we are viewing the situation here where the person who was killed added to the fuel, poured the fuel on the flame. Assume a situation where a person whom I talked about walking into the store and not intending to kill or hurt, but just to rob, take some money from the clerk and is on his way out without harming anyone, puts the pistol back inside his pants and is walking out. The clerk pulls the pistol from under the counter, hits the defendant in the back and in an act of self preservation, the defendant [sic] the pistol from his belt and fires at the clerk because he knows the clerk will kill him if he doesn't shoot the clerk first. He can't claim self defense, but you can see that the clerk, by his actions, has contributed. We are not applying any criminal responsibility to the deceased to the fact he is killed, we [p. 1098] are not in any way absolving the defendant of guilt for the act that he has done, but we are presenting this to you as a manner in

which you can, if you feel it is proper, punish the defendant by life in the penitentiary, as opposed to death. It is more or less an issue of mitigation. It is not an issue of justification, but mitigation. Do you understand what I am driving at?

A Yes.

Q Obviously, it kind of does contrary to our beliefs that a person has a right to defend his property, and we are not condoning what the defendant has done in taking the person's life, but what we are doing is saying consider the deceased's conduct in determining whether or not in light of that provocation, if any, the defendant was unreasonable in taking the life of the deceased, not justification, but mitigation. You understand the concepts, sir?

A Yes.

Q Have I said anything up to this point, Mr. Gilroy, that you do not understand or require any further explanation?

A No.

[p. 1099] Q All right, I know, reflecting back for a moment upon special issue number one there are other fact situations that might be presented with regard to the phrase reasonable expectation that the death would occur that I want to cover briefly. In regard to the hypothetical situation that I gave you, there might be a situation where a person might walk into a store, planning to rob and then as I said in my last hypothetical, it may change to where he does take a person's life that he did not reasonably expect to take that person's life when he walked in the store in the first place, and in regard to that, this

might be a situation where the person fired the pistol and shot a person or defendant fired the pistol and shoots the clerk in the foot to stop him running after him, but he doesn't reasonably expect that the clerk is going to die by a gunshot wound in the foot. The clerk falls and hits his head on the edge of the counter and dies, and the person that shoots him is still guilty of the offense of capital murder, but it is not reasonable to expect that he expected that person to die. [p. 1100] Do you understand that, sir?

A Yes, sir.

Q I think that concludes all the comments. I trust that both sides will be as brief as they can be in the interest of the house. Mr. Hobbs, the Assistant District Attorney, will have a chance to speak with you, and the [sic] Mr. Thornton for the defense. Mr. Hobbs?

EXAMINATION BY THE STATE

QUESTIONS BY MR. HOBBS:

Q Good afternoon. I am Carl Hobbs, and I am an Assistant District Attorney assigned to prosecute in this case. The gentleman that was behind me and got up is also an Assistant District Attorney, Mr. Mike Addudel. This is Ms. Northcutt, a law student that is working with our office as a part of her studies. Basically, the Judge has talked a lot about legal concepts. I am going to try to cut my time down some, sir, but there are things I am going to have to talk about. The State has the burden of proof. That is beyond a reasonable doubt, not beyond all doubt or beyond a shadow of a doubt. If it was beyond [p. 1101] all doubt, I think you would agree that you would have

to have been there to see what happened. If you were there, you would be a witness, and not a juror. Any problem with that concept?

A No, sir.

Q There is conflict here – two sides. We are in the courtroom. If there weren't conflict, we wouldn't be here. Conflict, in and of itself, is not reasonable doubt. Your job, as a juror, is to resolve conflict, to decide which witnesses you choose to believe, all of their testimony, if you choose, only to believe part of it or if you want to, absolutely none of it. The State's burden as to beyond a reasonable doubt is to the elements of the offense. Those elements and only those. We don't have to show the defendant had a particular motive. We don't have to show what his particular mental condition or schooling, social status is or was at the time. We do have to show that he did an intentional act. I can't go into a person's mind and tell you what he is thinking about. I can show you what he did and what he said or if he just did [p. 1102] an act, actions alone will show one's intent. Actions and words, possibly or words alone or a combination thereof. Any problem with that, sir?

A No.

Q Now, those – the things that the State must prove in the first – we are talking about the first part of the entire trial. That is the guilt or innocence stage. And needless to say, if the defendant is found not guilty, we don't even talk about punishment. We don't get that far. The State must prove that it was the defendant, Gary Graham; that the offense occurred in Harris County, Texas; that it was on or about May 13th, 1981; further that

the defendant, while in the course of committing or attempting to commit the robbery of Bobby Grant Lambert, intentionally caused the death of Bobby Grant Lambert, by shooting him with a gun. Bobby Grant Lambert, that is. That is what the State has to prove beyond a reasonable doubt. Not what color pants or shirt or what color the sky was or how many cars were five blocks down the street. It is irrelevant and [p. 1103] immateral. It is whether or not those elements have been proved beyond a reasonable doubt. As an example, also prior to getting to that, the State must – under our law, an individual, when you reach the age of 17, you are an adult, subject to the entire range of penalty as any other adult for the laws and violations thereof. My question to you, sir, is: Would the mere age of an individual, whether that individual be young, very young or very old, yet in the classification as an adult, affect you to the degree that you would automatically, even though the State has proved the case to me beyond a reasonable doubt I'm not going to find this person guilty because they are too young or too old?

A No, I don't think that would make any difference.

Q You would look at the fact situation and decide whether or not the law had been violated and whether the State had proved it to you beyond a reasonable doubt?

A Yes.

Q I want to use an example that I would ask a question about, sir, that in relavance [sic] to the [p. 1104] guilt state, and also into – that – well – discussing special issues in the punishment phase, let us presume, sir, that

this room is a 7-Eleven Store, and that the following people are present in the store, okay?

A Okay.

Q Let's say that you are a person that is present in a relatively same position that you are now. Let's further say that there is a partition or blockage of some type as the Judge's bench is and also Mr. Pollinger is there, who is sitting down at the end. The bailiff, as you saw when you came in. You can't see him or you can only see parts of him?

A Yes.

Q Mr. Pollinger is working the cash register and it is near the end of the shift, and he is taking the money from the register for the day, he puts it in the bank bag, slips it in the coat he has on with part of the bag sticking out, and furthermore, he is restocking for the day and he has a box in his hand, and he is putting things in behind the register area, in the shelves there. [p. 1105] Furthermore, let us presume that Mr. Mock is also present in the store, and he is sitting in this area in say about the same position that Ms. Northcutt would be. He is there. Furthermore, let Mr. Thornton – he is there, in an area such as he is here where he can see everybody that is concerned, and there is a partition, something similar to this inside of the store back of which Mr. Mock is. Further presume that I am the robber. I am going to be a robber. I come into the store, and I approach Mr. Pollinger, and I see the bank bag sticking up, and I can see it has something in it, and I know it is about shift time to end, and I'm going to take it. I approach. He is – he has a box and he is putting things on the shelves, and as I approach and

reach for that bag, he sees me and he turns, and I grab him, and when I grab him I come up with a pistol. I stick it next to his head, and about that time Mr. Mock sees the pistol, exercising some self preservation and good sense, dives down. He saw the pistol, but he can't describe me. No way. Other than what my race may be, or something of that [p. 1106] nature. Mr. Thornton is looking where he is at now in the situation we have described, sees me with the pistol next to Mr. Pollinger's head and hollers and when he hollers I turn and look at him, and Mr. Pollinger turns back and I turn and kill him, Mr. Pollinger dead, and I leave. You hear somebody going someplace, but you didn't see it. Say I am caught later on. I'm being brought in and I am being tried for capital murder. You are a juror. They didn't get a gun off me. They haven't got any property that I may have taken from there, and I didn't leave any fingerprints on anything inside the store. You believe that the State has proved to you that first of all, Mr. Pollinger was shot and killed with the gun during the course of a robbery, that it occurred in Harris County, and it was on or about a specific date. Now, the question is who did it. Mr. Thornton takes the stand and testifies. He said I saw Carl Hobbs, that man sitting in this chair, shoot and kill Mr. Pollinger during the course and commission of that robbery. My question to you, sir, is if you believed all those [p. 1107] other factors, all those other elements have been proved and further that you believe beyond a reasonable doubt the testimony of Mr. Thornton, that I am, in fact, the robber, could you based upon the testimony of a single eyewitness, find an individual guilty of the offense of capital murder?

A Yes.

Q Okay. Now, let's go further. Now in the course of committing theft, we are talking about robbery, and we talked about robbery in the State of Texas can be committed without any property being taken. I can come up to you and pull a gun and an officer can come up behind me, you know, I demanded your property and he can come up behind me and say drop it, well, I have committed aggravated robbery, and I haven't gotten anything. I can start to take your pen and you jerk back and I shoot and kill you in the course of taking. In the course of committing theft means in an attempt to commit, during the commission of it or in the flight after the attempt. Now, you have been found guilty of capital murder, and we are going to go to consider special [p. 1108] issue number one. Basically, as you have gone over it with the Judge, you know by its very definition and by its very wording that you must look at the evidence of the fact situation that existed in the first phase of the trial in order that you can answer that first special issue. Okay?

A Okay.

Q You have decided whether the act, my actions, I committed the conduct of the defendant, that caused the death of the deceased was committed deliberately. You have to decide whether me pulling the gun, putting it up next to his head, him breaking away and me shooting him was a deliberate act on my part. Then you have to consider whether there was a reasonable expectation that the death of the deceased would have occurred. Say, in the instance – furthermore, say I hit that individual in the chest when he was shot. That is, I think you can see that my actions may have been deliberate, depending on

where the bullet hit and where I shot, a reasonable expectation that death would occur. Now, if I shot you in the foot, I deliberately shot [p. 1109] you in the foot, you know that could change. I shoot you in the head, a shot to the chest, it changes, but based upon the evidence in the case and the State still has that burden of proof beyond a reasonable doubt as to those facts, okay?

A Okay

Q We still get a look at it, but you have to consider these two points. Move down to the next special issue, what does deliberately mean to you, sir?

A On purpose.

Q Willful or voluntary act. It is not an accident, and it is not reasonable expectation, just common sense, and you have to look at the fact situation, fitting it in as to the actions of the parties involved. Now, special issue number two. Probability is not defined. The Judge has told you what constitutes a criminal act of violence. Anything from breaking that clock on the wall, somebody else's property, slashing the tires, slugging you in the face, robbing you, rape, murder, capital murder, criminal acts of violence. Probability. Probability is not [p. 1110] defined. Likely. More than likely. Possibly. You have a definition that you are fond of, sir?

A For probability?

Q Yes, sir?

A I don't know. What you said.

Q A criminal act of violence that will constitute a continuing threat to society. When we are talking about a

society, I want you to view society in a very broad concept. In fact, society means all people that you come into contact with. In this instance, would you agree that individuals that are confined to penal institutions are also part of our society? They are there, but they are part of our society?

A True.

Q Furthermore, that the guards or the prison officials that are working there are members of our society, so when you are asked, the criminal acts of violence that will constitute a threat, a continuing threat to society, to consider those folks, too. Now, here special issue number two, I think you can see could possibly be answered by answering based upon [p. 1111] just the fact situation that existed in the act, the evidence that was presented. But in most instances this special issue number two allows the Judge to, for both sides or either side, but primarily the State, since the State has the burden, the defense does not have to do anything to bring evidence and the Court can allow evidence that is – that the Court deems permissible in that stage to aid a jury in answering that question. That could consist of, it doesn't have to, prior criminal records, if any, other criminal acts of violence, if any, reputation witnesses, if any. I think it is conceivable that one could believe that he will come in and say he was good or has been very good. I can't understand why he did it this time or they can come in and say he is terrible and he has also done it before, but once again, you can see –

MR. MOCK: We would object to that misstatement of the law as to reputation. That would only be allowed as to his reputation being good or bad.

THE COURT: That is sustained.

Q When we are looking at special issue number [p. 1112] two, other evidence other than just the mere fact can be presented to aid you to answer whether or not a probability, whether that person – I can't tell you definitely it's going to occur, but you can judge based upon the evidence before you. Do you have a problem with that concept?

A No.

Q Now, special issue number three, if it is raised by the evidence. Here, we are talking about, let's go back to the example that I posed there, for purposes of discussion on this. Now, the question is was whether or not the conduct, since I'm the one that committed the crime, whether my conduct was unreasonable. That is a question that you have to judge. My conduct. Why was the conduct – the first thing you have to do is ask in that instance what did Mr. Pollinger do. You ask yourself what did he do, if he did anything. First, if he did something, then you next have to decide whether or not if this issue, whether it was provocation, if any. You could say that he did something, but you don't have to agree that it was [p. 1113] provocation. Then whether you say it is provocation or not, let's assume that you said that it was provocation, if you said – decided well, that was something or he did this may or may not be provocation. Well, if he did that was the reaction that I did in relation to what he did, was my actions unreasonable and an unreasonable response to that action on the part of Mr. Pollinger before I killed him. In a situation there, you have to ask yourself what, in the part that I gave you, he was

holding the box and I tried to grab other things. He turned. I grabbed him and pulled the gun up. He broke away and I shot and killed him. You would have to ask yourself whether or not that was provocation, whether or not the actions was unreasonable, what I did, the shooting of him, was it unreasonable. Let's change the fact situation there to get an extreme context, okay?

A Okay.

Q Let us say that I got the money out of the coat pocket, that I got to the door, and I had my back to him, and he shot me and hit me [p. 1114] in the arm, and I'm almost out the door. I am almost out the door. I get back up and I haven't drawn my pistol, and he shoots me in the leg, and I see him coming. I'm down on the ground. I see him coming with the gun, and I pull my gun and shoot and kill a man. I'm still not absolved from the offense I committed, but I think it is an extreme contrast there and the actions, what, if anything did I do, was it provocation. What did I do? What did Mr. Pollinger do, and was my reaction to whatever he did unreasonable. You may or may not in the extreme situation there, may find one way or the other, anything in between. So you look at the fact situation if it is there, but once again, it will – it's a judgment, individual judgment of the jury, whether or not the act was unreasonable and if the action on the part of the deceased was any provocation whatsoever. Okay?

A Okay.

Q Sir, is there anything that I have failed to ask you that you feel that you would like to ask about or get some clarification on?

A No, I don't believe so.

Q [p. 1115] And in the proper situation, knowing that your answers, if you answered special issue number one and number two, which questions always will be submitted, let's assume all three were submitted and answered yes to all three and you know that those yes answers and that the proper answer to each one of those special issues was yes, because the State had proven to you beyond a reasonable doubt on the evidence that was presented, knowing that that result would – that those three yes answers would result in the death penalty, could you render those yes answers, knowing that the death penalty would ensue?

A Yes.

Q No matter what the age of the individual?

A Yes.

MR. HOBBS: Pass the witness.

[p. 1116] EXAMINATION BY THE DEFENSE

QUESTIONS BY MR. THORNTON:

Q Good evening, Mr. Gilroy. I realize the lateness of the hour, and I only have a few questions I want to ask you. I noticed you were born in Illinois, and you eventually moved to St. Louis. Approximately when did you move to St. Louis?

A Since I was a year old.

Q I also noticed you went to Desmond High School. This was in St. Louis, and that is a catholic school, is it not?

A Yes, it is.

Q You have been in Houston approximately 4 years, right?

A It will be five in January.

Q Five in January?

A Yes.

Q And you are in architecture. How long have you been in that field?

A I started out in college in architecture and took a year and a half and eventually switched over to construction and graduated in construction.

Q [p. 1117] I'll assume, and being from St. Louis, myself, I assume you went to Washington University, based on the architectural school?

A Right.

Q You have never served on a criminal jury before?

A Correct.

Q Okay, so this experience is rather new to you, wouldn't you say?

A Yes, it is.

Q Could you tell me what your first impressions were, your reactions were when you received your jury summons?

A I didn't – it didn't bother me. I think I had the civil case about a year and a half and I was called about seven or eight months ago for another criminal court, but wasn't selected for a jury, so it has been coming pretty regular, I guess.

Q But under the concept of our laws as far as reasonable doubt and the presumption of innocence, you have no problems with those?

A No, sir.

Q And you also understand what is and what is not evidence, in the sense that only what [p. 1118] you hear on the witness stand from the witness stand is evidence, correct?

A Right.

Q Could you tell me, please, sir, your views on capital punishment and the death penalty?

A I agree with it, but I am not very pro capital punishment or totally against it. I think it depends on the circumstances.

Q Okay, in the proper case you feel it is right?

A Yes.

Q It is a necessary penalty?

A Yes.

Q Do you feel that based on what the individual did or do you feel that, say, it would be a deterrent to somebody else's committing some later conduct?

A I think there is some of both there.

Q Okay, I mean your feelings are some of both is that what you are saying?

A Right.

Q You feel in some instances it may be deterrent to somebody else committing a similar crime?

A I think the capital punishment, it is not a particular case, but capital punishment, it does act as a deterrent to other people to [p. 1119] commit those crimes, stop them.

Q And you would calssify [sic] murder as one of those crimes?

A Murder in the proper circumstances.

Q How long have you had those beliefs? Have you ever felt that you were not against the capital mpunishment [sic]?

A No, I don't believe so.

Q So, it is just something that has evolved over a period of time?

A Yes.

Q Okay, would the mere fact you would have to sit on a capital murder case affect you on how you would deliberate on any of the issues that might be brought before you, say, just because somebody faces a possibility of death, would you, say, weigh something less or more?

A I don't believe so. The case, I'm sure the case is important, no matter what the punishment.

Q So regardless of whether or not the person, say, is charged with theft and the person is charged with capital

murder, and you would still weigh the evidence that was presented to you the same, just the mere fact the severity of [p. 1120] the penalty wouldn't cause you to weigh it any differently?

A No one way or the other.

Q Okay, do you believe you could sit down and be an impartial juror?

A Yes.

Q Do you feel you would be able to divorce your emotions on how you personally feel, your emotions on being able to deliberate on the facts and circumstances being brought before you?

A Yes.

Q Do you have no problems with that?

A No.

Q Okay.

MR. THORNTON: Pass the witness, Your Honor.

THE COURT: What says the State, Mr. Hobbs?

MR. HOBBS: The State will accept.

THE COURT: What says the defense?

MR. THORNTON: We will accept, Judge.

THE COURT: Mr. Gilroy, would you stand and be sworn as a juror in this case.

(At this time juror sworn.)

[p. 1121] THE COURT: Mr. Gilroy, this will conclude your service at this time on this particular case. As you can tell you are the 7th juror in this case. We have five more, plus one alternate to select before we begin. We anticipate this will be completed next week, and we anticipate that the testimony in this case will begin on the 26th, which is a week from Monday. We further anticipate that it will take one week to dispose of the case. I am just telling you that for the purposes of notifying the company you work for. There will be no need for you to run to the courthouse until you are summoned or informed by Mr. Pollinger as to when the Court – when the trial of the case is going to begin. The trial will not take place in this courtroom, but in my courtroom, which is on the 4th floor of this building. We have phone numbers for your home and your business, if either of these change, or we need to locate you somewhere else, if you would call Mr. Pollinger and inform him as to those changes?

JUROR: That will be fine.

[p. 1122] THE COURT: We will contact you in the middle of next week to reassure you that we plan to start on the 26th. With that, you are excused, and if it is necessary for you to show anything to your employer to show you have been here, the clerk, will provide that for you. Thank you very much.